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FEDERAL COMMUNICATIONS COMMISSION REPORTS

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Decisions, Reports, Public Notices, and Other Documents of the Federal Communicatons Commission of the United States

VOLUME 92 (2d Series)

Pages 1–203

Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

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Telephone Equipment, Registration of

Second Notice of Proposed Rulemaking and Order adopted to accommodate one and two-line (non-system) business and residential premises wiring under Part 68, modify the qualification standards of Section 68.215(c), and decision not to include party line service under Part 68.

—*Amendment of Part 68*
CC Docket No. 81–216

FCC 82–495

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matters of	
Petitions Seeking Amendment of Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network	CC Docket No. 81–216
and	RM–2845
	RM–2930
	RM–3195
	RM–3206
Notice of Inquiry into Standards for Inclusion of One and Two-Line Business and Residential Premises Wiring and Party Line Service in Part 68 of the Commission's Rules	RM–3227
	RM–3283
	RM–3316
	RM–3329
	RM–3348
	RM–3501
	RM–3526
	RM–3530

SECOND NOTICE OF PROPOSED RULEMAKING AND ORDER

Adopted: November 4, 1982; Released: November 12, 1982

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

1. By a *Notice of Proposed Rulemaking and Notice of Inquiry* in Docket No. CC 81–216, 85 FCC 2d 868 (1981), the Commission sought public comment on a number of rulemaking petitions and on its inquirty into other issues germane to Part 68 of the Commission's Rules. Part 68 provides the technical and procedural standards under which direct electrical connection of customer-provided telephone equipment, systems and protective apparatus (in the aggregate "premises equipment" or "CPE") may be made to the nationwide network without harm and without a requirement for the interposition of telephone company-provided protective circuit arrangements (PCAs).[1]

2. In the Notice of Inquiry (NOI) portion, the Commission sought public comment on (1) whether it should structure its Part 68 rules to accommodate one and two-line business and residential premises wiring and, if so, what kinds of institutional controls should be utilized to reach that end, and (2) alternative vehicles for including party line service under Part 68. As indicated in the NOI,[2] these two issues are linked to other proceedings and require expeditious resolution.[3] Therefore, we will focus our attention here on the NOI and consider the other matters in this docket[4] in a forthcoming order. We now propose, for final public comment, specific rules and policies under Part 68 with regard to the wiring issues, but, for the reasons discussed in Section II, *infra*, we do not propose to include party line service under Part 68.

I. One and Two-Line Business and Residential Wiring

3. As noted in the NOI, under current Part 68 rules telephone company customers may choose to remove a carrier-provided PCA or perform

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[1] A PCA is an electronic device that prevents harmful voltages or signals emanating from customer-provided equipment or premises wiring from entering the telephone network.

[2] 85 FCC 2d at 897 and 900.

[3] *See* First Report and Order in Docket No. CC 79–105, 85 FCC 2d 818 (1981), *recon. denied*, 89 FCC 2d 1094 (1982), Further Notice of Inquiry in Docket No. CC 79–105, 86 FCC 2d 885 (1981); Second Computer Inquiry in Docket No. 20828, 77 FCC 2d 384 (1980), *aff'd on reconsideration*, 84 FCC 2d 50 (1980), *further reconsiderations*, 88 FCC 2d 512 (1981), *appeal pending sub nom.* CCIA v. FCC, No. 80–1471 (D.C. Cir. filed May 5, 1980) (hereinafter cited as *Computer II*); and Notice of Proposed Rulemaking in Docket No. CC 82–681, 47 Fed. Reg. 44,770 (October 12, 1982).

[4] The rulemaking petitions that initiated the NPRM proposed, among other matters, reduction in the dc on-hook resistance requirements of Section 68.312(a) (RM-2845); changes in Section 68.304, Leakage Current Limitations, Section 68.306, Hazardous Voltage Limitations; and Section 68.308, Signal Power Limitations (RM-2930); adoption of new registration designations for fully protected key telephone systems and PBXs that utilize external cross-connect fields (RM-3227); requiring country of origin labeling on all equipment registered under Part 68 (RM-3501); accommodation of local area data channel service under the registration program (RM-3526); and registration and direct connection of customer-provided equipment to American Telephone and Telephone Company's (AT&T) Dataphone Digital Service (RM-3530). In addition to these petitions, the Commission, *sua sponte*, proposed rule amendments on related issues such as registration of power supplies; elimination of the abbreviated registration requirements for extension cords, electrically transparent adapters and connectorized panels, and specification that such passive devices are connectible without registration or notice to telephone companies; registration of test equipment; consistency with Part 15; and limitations on automatic dialers.

multi-line wiring operations.[5] In short, multi-line premises wiring may be performed under the supervision of either a person properly authorized by the equipment registrant, typically the manufacturer, or by a professional engineer licensed in the jurisdiction in which the installation is performed.[6] By these institutional restrictions, we observed, there is reasonable assurance that no harm to the telephone network will occur as a result of work performed on premises wiring associated with PBX and key telephone systems, *i.e.*, multi-line systems and wiring, by non-telephone company personnel. We then instituted an inquiry to investigate expanding these rules to permit telephone customers and others to install and maintain customer-owned premises wiring (COPW).[7] We stated that the policies set forth in *Computer II* to detariff terminal equipment, as well as our purpose in Part 68 to provide for uniform standards for connection of terminal equipment and associated wiring, warrant inquiry into the rules necessary to include customer-provided one and two-line premises wiring under the purview of the registration program. We concluded that inclusion of COPW will essentially complete the scope of Part 68 so that virtually all network-related customer premises activities, both equipment and wiring, will be available to telephone customers from entities other than their local telephone company.

4. As a preliminary matter, we invited interested persons to offer views on an appropriate definition of the exact point that defines the termination of telephone company facilities and the commencement of COPW. Following the example of the State of New York Department of Public Service, we referred to this point as the "demarcation point." Recognizing that regional practices might require either a more universal or more specific definition, we asked interested parties to comment on the following questions:

1. How should "demarcation point" be defined? To what extent and how must the definition take into account the variety of building structures, types of customers in such structures, and telephone company services rendered?"

2. What practical difficulties or situations are likely to cause ambiguity or confusion in application of the definition? Where possible, provide statistics on the rate of

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[5] *See* NOI at 894–7. Multi-line wiring refers to telephone wiring associated with private branch exchange (PBX) and key telephone systems.

[6] *See* Section 68.215(c) of the Commission's rules, 47 C.F.R. § 68.215(c).

[7] One Party that filed comments in the NOI suggested that "CIPW" (customer installed premises wiring) is a better term that "COPW" because "CIPW" properly limits reference to the wiring that is actually installed by the customer (GTE Comments at 4). We do not believe "COPW" fails to identify wiring that is properly the subject of this proceeding, *viz.*, wiring *owned* by the subscriber, even if installed originally by the carrier. Such wiring could be modified or augmented by the customer under "COPW" rule provisions. Moreover, while we are employing the term "COPW" for purposes of discussion in this NPRM, any rules which may be adopted will apply to carriers' (and others') installations of wiring. Since the rules we are proposing in this NPRM are patterned after the carriers' existing practices, no new burdens will be created thereby.

occurrence of such problems. Address how the definition proposed in response to question 1 accommodates these problems.

3. What rules, if any, are necessary to avoid or minimize the problems of coordination among the building owners, lessees, contractors, installers, users and the serving telephone company in locating the demarcation point?"

4. To what extent should the customer or telephone company be permitted to redefine the location of the demarcation point in a given premises? Should local practices determine whether the demarcation point may be located at a protector, outside in a weatherproof box, or at a terminal block, or would the location be negotiable? What provisions should be made for grounding?"

5. To what extent do Commission Part 68 policies, rules, and recent decisions require telephone company installation of a standard jack at the demarcation point upon customer purchase of in-place wiring?[8]

5. In order to better assess the potential harm to telephone company personnel or consumers, we also asked that interested parties comment on the following issues:

6. The extent to which harm (as defined in Part 68 of the Rules) is likely to be caused by customer installation or ownership of one and two-line business and residential premises wiring. (Provide data concerning the incidence of such harm in the past.)

7. Whether institutional or non-institutional controls or safeguards should be established to prevent the harms indicated in issue 6. Which mechanism would best achieve these safeguards: telephone company-provided standards, federal rules, or reliance on local electrical standards? (Provide proposed rules.)[9]

We noted that these issues are not exclusive. For example, inquiry into possible standards for COPW might result in suggested changes in Section 68.215, the multi-line premises wiring rule, or the need for a uniform set of standards for all premises wiring, including multi-line wiring. Underlying any such need would be the technical issue involving the nature of potential harms associated with multi-line wiring and COPW; the technical-legal issue concerning the requisite level of competence for assuring that no significant harm is likely to occur as a consequence; and the legal issue of liability for damages that occur to either the telephone network or customer-owned equipment. We specifically excluded comment on economic and accounting issues under consideration in other proceedings, *e.g.*, Docket No. CC 79–105, *supra*.[10]

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[8] NOI at 898–9.

[9] NOI at 899.

[10] *Id.* at 900.

The Comments

6. Sixteen persons filed comments in the COPW NOI,[11] representing telephone carriers, users and manufacturers. The bulk of the comments were directed toward the development of a workable definition of "demarcation point," though views and suggestions were offered on all aspects of the issues presented. TIU, which represents some 60,000 telephone company workers, suggests that the network would be adversely affected by improper wiring techniques, such as the use of thermostat wires. TIU also notes its concern for the impact of COPW on the versatility of the work force that responds to disasters, and the prospect of "skimpy maintenance forces." (TIU Comments at 4) CWA, which also represents workers in the communications industry, generally opposes COPW because, it claims, COPW will cause the loss of jobs, increase costs to consumers, and result in loss of service. (CWA Comments at Appendix C) In the following sections we first review the comments filed with regard to COPW generally, and then, seriatum, we consider the questions raised in the NOI.

7. The majority of parties favor locating the demarcation point at or near the protector (or other protective device) or terminal block provided by the wiring telephone company. (*See* paras. 17–18, below, for a description of the protector.) REA suggests that defining the demarcation point at the protector takes into account a variety of building structures, types of customers and services. (REA Comments at 8) GTE offers the following definition:

> The physical and electrical demarcation between customer installed premises wiring and the telecommunications network is a telephone company provided Standard Interface or a telephone company provided registration program jack. (GTE Comments at 7)

This definition, GTE urges, is independent of building structures, types of customers in such structures, and telephone company service rendered. It also provides flexibility for those areas where a protector or nearby terminal strip is the telephone company provided Standard Network Interface.

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[11] AT&T, Association of American Railroads (AAR), the People of the State of California and the Public Utilities Commission of the State of California (California), Central Telephone & Utilities Corporation (Centel), Communications Workers of America, AFL-CIO (CWA), Continental Telephone Corporation (Continental), GTE Service Corporation (GTE), Independent Data Communications Manufacturers Association, Inc. (IDCMA), North American Telephone Association (NATA), Department of Public Service of the State of New York (New York) National Telephone Cooperative Association (NTCA), Rural Electrification Administration (REA), Southern Pacific Communications Company (SPCC), Telecommunications International Union (TIU), United States Independent Telephone Association (USITA), United Telephone System, Inc. (UTS), and Utilities Telecommunications Council (UTC).

8. NTCA favors a definition that assures ease of access. For residential buildings, NTCA proposes the following:

> The demarcation point is at the subscriber side of the protector, enabling the telephone company to assume responsibility for the drop, the protector, the grounding system (including the bonding to the water system), and the electric system ground. (NTCA Comments at 3)

For rural systems, NTCA recommends that the protector be installed on the outside at a location easily reached for grounding and access. Similarly, for commercial buildings, NTCA urges that the demarcation should be located at a point where access is readily available to the telephone company. NTCA also favors a customer-owned, inside disconnecting device for new installations.

9. SPCC suggests that the demarcation point be the protective device or equipment that the local operating telephone company would normally install at "the most logical entrance to the building from the street," subject to negotiation between the telephone company and the building owner, contractor and/or installer. (SPCC Comments at 6)

10. For its part, NATA suggests that the demarcation point for existing wiring be located at the terminal block or plug location, at the point of entry or cross-connection, and at the telephone room on each floor in high-rise buildings.

11. Continental suggests that the demarcation point be located between the customer's wiring and the network access point, on the service side of the entrance protector. Continental's principal concern, which is shared by several other parties, is that the COPW be easily disconnectible for trouble-shooting. It therefore recommends the use of standard modular jacks and plugs and locating the demarcation point outside if sufficiently durable hardware is available. (Continental Comments at 12–13) Where no dedicated equipment room is available in multi-occupancy buildings, Continental would locate the demarcation point at the actual occupancy areas, as though each area were a single occupancy dwelling. Factors such as dangerous conditions, lack of space, security problems, or building management preferences would be considered in this decision, which would be made by the carrier in conjunction with building management. UTC, with similar concerns for safety and reliability, merely urges that the demarcation point not be located in hazardous locations, environments customers are not equipped to access, roadside pedestals, and the like. (UTC Comments at 2)

12. Centel, which represents some fifteen telephone companies, believes that a number of locations can be identified as appropriate demarcation points. Centel distinguishes among: (a) single or multi-occupant buildings in which individual units are directly wired from the outside; (b) multi-occupant buildings having an outside protector built with individu-

al units wired from a common terminal box or panel on the inside; and (c) multi-occupant buildings in which individual units are wired from a terminal room located inside the customer's premises. (Centel Comments at 4) Because of the limits of present technology and the various situations encountered by carriers, a flexible policy regarding the demarcation point should be adopted, according to Centel. Such a policy, Centel suggests, would permit the carrier and customer "to negotiate a mutually agreeable demarcation point." (Centel Comments at 10)

13. California recommends that the demarcation point in a single residential house should be at the protector because it "provides a clean simple break between customer and telephone company and eliminates the need for writing rules covering the possible varieties of building structures." (California Comments at 1) California also recommends installation of a disconnect device at the protector, but only where there is "new construction."

14. New York, for its part, suggests that the most practical means of resolving the demarcation point issue is to permit state public utility commissions and telephone companies to jointly decide a workable solution. "This will enhance technical innovation to the demarcation point and provide flexibility to accommodate local operating conditions and peculiarities." (New York Comments at 7–8) Nevertheless, New York favors location of the demarcation point on the customer's premises at the interface, *e.i.*, the protector block, distribution block, standard jack or connecting block. (New York Comments at 8)

15. AT&T recommends placement of the demarcation point inside each subscriber's premises, near the service entry point or protector and reasonably accessible to the customer and telephone company. It also recommends installation of a jack at the demarcation point, but only when there has been a service call. For single family structures, AT&T suggests the demarcation point be in the basement or utility entrance point, near the protector. In multi-floor, multi-tenant buildings, AT&T would define the demarcation point as within each customer's premises, with inaccessible or hazardous locations subject to local tariff alternatives. (AT&T Comments at 103–04) AT&T suggests in its reply comments that a "zone of reasonableness" around the protector be established so that the demarcation point may be defined at any location on the customer's side of the protector, including any standard jack. (AT&T Reply Comments at 83)

16. UTC, in its reply, opposes NTCA's suggestion regarding an outside demarcation point. It favors retention of the inside demarcation point, but would permit additional disconnect points, at outside locations, if such points are provided by the telephone company. Continental rejects UTC's position in opposition to the required standard jack. UTS differs with AT&T on the use of minimodular (standard) outside jacks, citing ease of

premises access and carrier savings in customer premises visits. (UTS apparently uses outside protectors.)

Question 1: The Demarcation Point

17. *Discussion.* It is apparent that there is no single definition for demarcation point that would encompass the current practices of all telephone companies in this country. However, some definition is needed that reflects the basic features of the interface between CPE and network facilities so that implementation of *Computer II* and Docket No. CC 79–105 may proceed. Such definition also serves as the foundation for the application of all other COPW standards. New York's position favoring joint telephone company-local public utility commission responsibility for the development of the definition is contrary to these purposes, since there could be no assurance of uniformity of standards among the utility commissions. Its position must therefore be rejected. (We note, however, that the definition we propose at para. 20, below, is consistent with the essential features New York favors.) In developing a basic definition, we note that all telephone companies incorporate some means to safeguard customers' premises from atmospheric or other electrical discharges that may strike or may be induced into outside telephone wires.[12] The usual location of the apparatus that accomplishes this protection is at or near the point of entry of the telephone service wiring into the customer's premises. Terminal blocks with carbon strips or gas discharge tubes (in the aggregate, protectors) provide a low resistance path that route potentially hazardous voltage spikes to ground. Surges that would otherwise enter the customer's premises are thereby directed harmlessly to the earth. (No other terminating equipment is required.) Essential to effectuating proper operation of any protector is good electrical contact with the earth, *i.e.*, good grounding. A copper rod driven into the eath or connection to a cold water pipe within the premises usually serves this purpose adequately.

18. Generally, due to environmental factors, the protector (or its equivalent, see n. 12) is located inside the customer's premises. Several parties submitting comments make it clear that this is not universally true, but all parties would appear to agree that the most practical and acceptable demarcation point between inside wiring and outside wiring, *i.e.*, COPW and carrier service facilities, is on the customer's side of the protector and its attendant grounding means. Most parties seem to favor a definition

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[12] *See* National Electrical Code (NEC), Chapter 8, Article 800, which specifies the means of protection required for such communications circuits. The NEC, which is sponsored by the National Fire Protection Association under the auspices of the American National Standards Institute, contains safety standards for persons and property from hazards arising from the use of electricity. A protector is neither required nor ordinarily used if the cable is underground. For this reason, parties have argued in favor of a "protector or equivalent," *e.g.*, terminal block or jack, definition of the demarcation point.

that is flexible enough to encompass existing protector location practices, whether outside or inside. Disagreement among the parties arose, however, over the need to establish a means to rapidly and easily disconnect COPW from the network. We will discuss that matter at paragraphs 37–44, below.

19. We believe that reliance on existing protector location practices offers the most practical and flexible solution to the problem of developing a uniform definition of the demarcation point for all building types, including multi-unit buildings. Multi-unit buildings present peculiar definitional difficulties.[13] As noted by several parties, the protector in such structures may be located in an equipment room, or each unit may be separately served, either from a common point or independently, depending on the characteristics of the structure itself, whether the occupants are residental, industrial, and/or commerical, and the nature of the communications services provided.

20. Each telephone company's practices are reflected in its choice of protector design and placement. For each building type, a protector or protectors are in place. Existing wiring, then, inherently incorporates a demarcation point on the customer side of the protector, or a demarcation point at each protector where there are two or more protectors in one building. Further, we believe that the proposed demarcation point definition should encompass all wiring, including multi-line wiring associated with PBXs and key systems. We therefore propose a definition that will apply equally to new or existing premises. Sections 201(a) and 202(a) of the Communications Act require that telephone companies furnish service upon reasonable request and avoid unreasonably discriminatory practices. In order to assure that location of the demarcation point by local telephone companies is achieved in accordance with these requirements, we propose to add an additional sentence to the definition. In sum, we propose the following:

> The interface or demarcation point shall be located at the subscriber's side of the telephone company's protector, or the equivalent thereof where a protector is not employed, as provided under the local telephone company's (reasonable and nondiscriminatory) standard operating practices.

Responsibility for proper grounding of the demarcation point protector would remain with the telephone company, unless the subscriber rendered such grounding ineffective by erroneous wiring procedures conducted under his or her direction. Responsibility for COPW (including any protector that may be installed as part of the premises wiring, See n. 15, below.), purchased in-place or wholly or partially new, would rest with

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[13] Multi-building complexes exacerbate this problem, but our proposal, which is discussed in detail below, applies to those structures as well.

the customer (or subsequent owner of the COPW). Parties are invited to comment on this proposed definition.

Question 2: Definitional Problems

21. The second question was directed at the difficulties attendant upon implementation of proposed definitions for demarcation point. We also sought comment from public utility authorities and telephone companies acting under appropriate local tariff authority that already have initiated COPW programs.[14]

22. NTCA suggests that if a disconnect device is developed and installed at the demarcation point by the customer, the short section of wire between the protector and the disconnect device should be the responsibility of the customer. NTCA states that because "this section [of wire] is so short visual inspection will reveal any problems which the customer must remedy." (NTCA Comments at 4)

23. Continental notes that in its experience in New York, where 69 of its 134,000 single party customers had elected (by April 1981) to own their own inside wiring, a mixed ownership syndrome is developing. Customers attach new COPW to existing jacks, which "creates a dangerous condition in that the customer must access the protector in order to troubleshoot his wiring." (Continental Comments at 19) Continental urges that any federal rules should minimize the possibility of occurrence of such problems.

24. California recommends that the demarcation point be accessible to both the telephone company and the customer. It would leave the details regarding achievement of its goal to local authorities. (California Comments at 1–2)

25. *Discussion.* At first blush, NTCA's suggestion that any short wiring section between the protector and a customer-installed disconnect device be the responsibility of the customer appears appropriate. However, as we discuss in detail at paras. 40–42, below, any disconnect device that constitutes the demarcation point inherently defines all wiring on the telephone company side of the device as carrier wiring, and all wiring on the customer side as COPW. NTCA's suggestion would be contrary to this orderly assignment of responsibility. It must therefore be rejected. Continental's concern about confusion from an array of "mixed COPW ownership" is largely resolved in paras. 40–44, below, where we discuss the matter of jack requirements and additions to existing wiring.

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[14] The following jurisdictions currently permit some form of COPW: New Jersey, New York, Minnesota, North Dakota, California, Orgeon, Connecticut, Ohio (Cincinnati Bell service area only), North Carolina, South Carolina, Florida, Georgia, Kentucky, Tennessee, Texas and Wisconsin. It is our understanding that the following jurisdictions are planning such programs: Washington, D.C., Maryland, Illinois, Michigan, Arizona, Colorado, Idaho and Missouri.

Finally, we believe that California's recommendation is implicit in our proposed definition at paragraph 20, above.

Question 3: Coordination Problems

26. In question 3, we asked interested parties to propose rules that would minimize the problems of coordination among the building owners, lessees, contractors, installers, users and the serving telephone company in locating the demarcation point.

27. REA recommends that all parties having an interest in the wiring of a given premises should consult with the serving telephone company prior to any installation, and accept the decision of the telephone company as to the location of the demarcation point. (REA Comments at 9) GTE observes that coordination is not a new problem, and that only prior notice to the telephone company is needed. (GTE Comments at 8) For its part, NTCA urges that the Commission adopt rules that would: (1) define the demarcation point and the responsibility of the telephone company; (2) prohibit the customer or his agent from making changes in or to the protector, the grounding or the grounding connections; and (3) specify that all new installations include a disconnecting device for customer convenience. (NTCA Comments at 4–5)

28. SPCC wants assurance that the telephone company will provide the desired connection within a reasonable time period. (SPCC Comments at 7) CWA suggests marking the demarcation point with a standardized symbol, apparently to alert persons of the purpose of the wiring underneath or nearby the symbol. (CWA Comments at 5) Finally, AT&T would rely on the self-interest of the customer to avoid the problems of coordination. It anticipates no problems as long as COPW rules and standards are observed. (AT&T Comments at 105)

29. *Discussion.* In our discussion of the definition of the demarcation point, above, we noted that a protector is generally used in conjunction with a ground connection to provide protection to the customer premises. As we propose to define the demarcation point, both the protector itself and the grounding means remain the responsibility of the serving telephone company. Accordingly, neither the telephone company customer nor his or her agent may change or alter either the grounding means or the protector.[15] NTCA's first two suggestions are therefore already contained in our proposals. Its third suggestion regarding a means of disconnection is discussed at paras. 37–44, below.

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[15] We recognize that certain aerial wiring between buildings or structures on a single tract of property not separated by a public way are frequently treated under tariff as a single "premises wiring." In such cases it would appear that code-required protectors and associated grounding may be installed by other than the local telephone company. However, this is by far the exception to the rule and NTCA's suggestions are not directed at such cases.

30. The other parties who commented on the coordination issue appear to agree that coordination among installation personnel and the telephone company does not portend an acute, unworkable problem. Absent any substantive comment to the contrary, we propose to rely on the parties engaged in COPW installation to coordinate demarcation point identification with their local telephone company, subject only to all applicable safety requirements under local tariffs or building codes. There has been no showing that requiring the labelling of cables with symbols or requiring telephone companies to provide connections within specified time limits is warranted. We therefore reject these proposals, but will revisit the matters upon a factual demonstration of need.

Question 4: Demarcation Point Redefinition

31. Question 4 sought comment on the extent to which and under what standards the demarcation point, subsequent to initial placement, may be relocated, and what provisions should be made for grounding.

32. REA would require any subsequent changes in the demarcation location to be entirely the responsibility of the party seeking the change, with grounding and protector installation subject to NEC Section 800.2. REA also urges banning the mounting of low voltage "crowbar" type arrestors at the line terminals within customer-provided equipment in order to avoid a low resistance short that would negate the usefulness of the protector. (REA Comments at 10–11) GTE would also assign grounding responsibility to the telephone company and would permit the customer to relocate the demarcation point on a negotiated basis with the telephone company. (GTE Comments at 9; CWA Comments at 5) SPCC would not permit relocation of the demarcation point in existing structures. (SPCC Comments at 7)

33. Continental would provide the telephone company with veto power over customer demarcation point relocation requests, and would charge the customer for all costs associated with any implemented change. As to grounding, Continental recommends that customers not be permitted to tamper with grounding arrangements or entrance facility hardware. (Continental Comments at 20–21)

34. UTC states that if the demarcation point location is negotiable at the outset, its relocation should be no less negotiable (UTC Comments at 3) New York adds that any customer need for a ground connection to suppress transient noise pulses in COPW or to assure terminal equipment operation would be the responsibility of the customer. (New York Comments at 10)

35. *Discussion.* The consensus of the parties submitting comments to question 4 supports telephone company responsibility for grounding at the protector, which is the generally recognized current industry practice. Compliance with local safety standards and practices would be

ensured by the serving telephone company. We do not view placement of this kind of discretion with the telephone company as inadvisable. As a practical matter, the demarcation point probably will not be relocated on a regular basis, nor is there any apparent incentive on the part of the telephone company unfairly to refuse relocation requests. These parties also agree that costs associated with customer-requested changes in the demarcation point location ought to be borne by the customer. However, whether charges should or could be made for any change is left to state regulatory authorities for resolution.

36. REA's concern about equipment-mounted arrestors is currently the subject of informal Part 68 industry meetings and will likely be resolved in that context.[16] SPCC's position with regard to a restriction against relocating demarcation points in existing structure is unwarranted in view of our policy favoring reliance on negotiation without regulatory intervention. Accordingly, we propose to add the following to our proposed definition of demarcation point:

> Subsequent relocation of a demarcation point my be arranged, either at the subscriber's request or on the serving telephone company's own initiative, but the telephone company shall not unreasonably discriminate in its treatment of demarcation point location, or relocation.

Question 5: The Jack Requirement

37. Our last "preliminary" question concerns a matter that several parties found relevant to developing their definitions of demarcation point. Question 5 sought comment on the extent to which Part 68, and Commission policies and rules, should require telephone company installation of a standard jack at the demarcation point of COPW.

38. Continental and AT&T favor the mandatory installation of a standard jack by the serving telephone company. AT&T would require such installation where there is existing wiring only "at the time a visit to the customer's premises was needed for maintenance purposes," and wherever there is new COPW. (AT&T Comments at 102)[17] Centel favors using any existing "first jack" as the demarcation point.

39. GTE asserts that a standard jack is not required at the demarcation point. (GTE Comments at 10). California, NTCA and UTC oppose jack installation where there is existing wiring. (California Comments at 1, NTCA Comments at 5, UTC Comments at 4) They suggest that the

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[16] *See* FCC Public Notice No. 25923, February 1, 1980, and page 22 of Instructions For Completing FCC Form 730, revised January 1982. There has been no showing that any safety hazard exists or is likely to occur as a consequence of utilization of arrestors in registered terminal equipment.

[17] The incidence of service calls for premises wiring repair appears relatively rare. Moreover, once a customer owns his or her premises wiring there is no requirement that persons who provide repair service be associated with the telephone company.

expense to the customer for such installation would serve as a deterrent to purchasing in-place wiring and would generally be counterproductive. REA argues that installation of outside jack/plug arrangements would be impractical and potentially difficult to maintain because of security problems, hardware unavailability, cost, and environmental factors. (REA Comments at 12)

40. *Discussion:* For the most part, the commenting parties agree that it would be inadvisable to require installation of a standard jack when a customer purchases existing premises wiring. The rationale offered by several parties for requiring a means of disconnection at the demarcation point is to permit more efficient troubleshooting of COPW and registered terminal equipment connected to it. Indeed, it is apparent that the primary beneficiary of such a requirement would be the customer. He or she could instantly remove all inside wiring from the network in the event of apparent line trouble and readily ascertain, with telephone company coordination (not a service visit), the likely cause of the problem.

41. It does not appear, however, that the economies associated with the installation of a plug and jack at the demarcation point of existing premises wiring justify a rule requiring such installation. Put simply, we fail to be persuaded that there should be a requirement for either the telephone company or the customer to install jacks and plugs at the demarcation point of in-place wiring. By the same token, we would not forbid a telephone company from installing such means of disconnection should the telephone company so choose, without a direct charge to the customer, either upon sale of the in-place wiring or as a matter of procedure on service visits. Nor would we oppose a local practice that would provide the customer with the option of having a jack installed at the demarcation point of existing wiring, *i.e.*, by the telephone company at a charge. Any such jack/plug arrangement would constitute the demarcation point for all purposes, both Part 68 and Docket No. CC 79–105.

42. New COPW, on the other hand, would benefit at minimal marginal cost from the installation of a standard jack and plug at the demarcation point. The new COPW could be easily disconnected from the telephone network in the event of circuit problems, and access to both network wiring and the COPW would be facilitated for troubleshooting purposes. The telephone company, as part of bringing telephone service to the premises, would be required to install a standard jack which would constitute the demarcation point, as above. Any such jack installed outside should be waterproof or housed in a waterproof enclosure.

43. One aspect of COPW that has not been addressed concerns the question of whether a jack must be installed at the demarcation point when a customer owns existing wiring and either hardwires (in compliance with applicable rules) or plugs a "connectorized" extension cord into an existing room or office jack. In current Section 68.3(t), [Multi-line]

Premises Wiring, we consider "connectorized," fail-safe wiring of up to 25 feet in length (and extended once again, in accordance with Section 68.3(t)(1)(ii), to 50 feet) to be fully protected and not subject to the installation standards of Section 68.215—Installation of other than "Fully-Protected" Premises Wiring. We established this exemption because we felt that the cords themselves are essentially harmless to the network and those who install them in the multi-line environment are well aware of the likely dangers associated with their installation. *See Third Report and Order* in Docket No. 19528, 67 FCC 2d 1255, 1276–77 (1978) *Third Report),* and Memorandum Opinion and Order in Docket Nos. 19528, 20774, and 21181, 70 FCC 2d 1800, 1811–12 (1979) *(Fourth Report).* We continue to believe that extension cords themselves are harmless; if there is any danger, it will be from faulty installation pracitces. These practices are discussed in detail below.

44. A customer who uses extension cords at existing jack locations is not distinguishable, for purposes of Part 68 and potential harm to the network, from one who merely plugs in a registered terminal device. We believe that neither situation warrants regulatory restriction. Thus, a customer who uses these cords in conjunction with existing wiring will be considered to have existing premises wiring only. However, a customer who hardwires new wiring onto existing wiring has altered the assumed harmless character of the existing premises wiring and would be treated as though all the wiring, both new and existing, were "new COPW." A jack at the demarcation point would be mandatory. As new types of wiring are introduced by manufacturers, such as "under the carpet" or ribbon wiring, new types of connectors may be necessary. Our rule proposals here are not intended to approve or disapprove any new connector or adapter, provided the connection at the demarcation point uses the standard, Subpart F plug and jack. Consistent with the foregoing, we are proposing herein simply to modify the definition of "interface" within our rules. This would have the effect of making Section 68.104 applicable to COPW to the same extent it has applied in the past to new and grandfathered equipment installation. *See Interstate of Foreign Message Toll Telephone Service,* 59 FCC 2d 83, 87 (1976). We invite interested parties to comment on these proposals.[18]

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[18] In our Further Notice of Inquiry in Docket No. CC 79–105, *supra* at n. 3, the Commission solicited comments regarding the regulatory status of inside wiring. In our final order in Docket No. CC 81–216, we intend to incorporate the comments and reply comments filed in Docket No. CC 79–105 regarding "simple" inside wiring. (The term "inside wiring" refers to the portion of telephone plant, including both labor and material, accounted for in account 232, "Station Connections," that is installed on the apparatus side of the protector block; "simple wiring" is wiring that is connected to one and two-line business and residential telephone service and which is not used in conjunction with common control equipment.) Our proposed definition herein of the "demarcation point" should resolve the issue of the proper regulatory treatment for new installations of such wiring. *See also* Notice of Proposed Rulemaking in Docket No. CC 82–681, *supra* at n. 3

Question 6: Likelihood of Harm:

45. In the NOI, we asked interested persons to comment on the nature of harm[19] to either the telephone company or the telephone customer that are likely to be caused by customer ownership of one and two-line business and residential wiring. We also asked for data in support of any such harms in the past.

46. *Discussion.* It is undisputed that, in theory if not in practice, if wiring is improperly selected and installed, harm could result, as improper wiring could negate the network protection otherwise accorded through equipment registration under our equipment registration procedures. Although convincing evidence has not been presented in this proceeding or previously that the potential problems which could occur in fact have occurred or will occur, when we considered such potential harm issues in the context of PBX and key telephone intrasystem and extrasystem wiring in the *Third Report* and *Fourth Report*, *supra*, we adopted a blend of institutional, regulatory and enforcement safeguards which, in our view, at minimal costs to all would assure that the theoretical problems would not occur. We also noted that in the largely business-related environment of PBX and key telephone system (and other system) installations, practical incentives operate so at to provide additional assurance that problems will not occur, *i.e.*, that the complexity of such systems assures as a practical matter that incompetent personnel will not be performing system wiring, and that such systems of necessity in the competitive system sales environment are held to high standards of reliability and quality. The blend of safeguards which is currently effective in Section 63.215 of our rules has worked. We have received neither complaints of harm nor complaints that the extraordinary rights granted carriers under Section 68.215 have been abused. Furthermore, in the NOI we specifically requested submission of evidence of the occurence of harm, and no such evidence has been forthcoming.

47. Most parties view the likelihood of such harm in the nonsystem environment on which this proceeding is focussed as quite minimal. SPCC, for example, expects the protectors to offer protection to the network (SPCC Comments at 8)[20], and Centel would rely on customers

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[19] Harm, as defined in Section 68.3(g) of the rules, includes electrical hazards to telephone company personnel, damage to telephone company equipment, malfunction of telephone company billing equipment, and degradation of service to persons other than the user of the subject terminal equipment, his calling or called party.

[20] We considered and dismissed this claim as incorrect in the *Third Report*. Normal "protectors" do not offer protection against imbalance, nor against contact with the power line voltage levels which in part or in whole are associated with premises in which telephone wiring is installed (e.g., 120, 203 and 230 volts commercial power). Our rules conceptually define a different type of protection apparatus than a normal "protector" which in fact would offer protection against power line contact, Section 68.3(t)(1)(iv) and (2), but this is not the "protector"to which SPCC refers.

themselves quickly to respond to and correct any wiring problems which might arise. Most parties also agree that technical standards akin to those in Section 63.215 for system wiring offer a significant means of preventing the occurence of potential harms (AT&T Comments at 98; New York Comments at 2–3; Continental Comments at 22).

48. Moreover, we must consider the results under various state programs authorizing the use of COPW. New York, for example, reports that its COPW program, which has been in effect for over two years, "has created no known incidence of harm to the network." (New York Comments at 2–3)[21] States other than New York are similarly permitting the use of COPW (n. 14, *supra*) and we have received no comments or information which indicates that experience in such states is any different from experience in New York. In response to our request in the NOI for comments concerning experienced harm, Continental has claimed that it has experienced one incident of what it would characterize as harm, in the form of noise from unauthorized COPW (that is, COPW installed without the authority of any state or federally-authorized program), but it also states that it has experienced no "network harms" from COPW). (Continued Comments at 21–22)[22]

49. We conclude from these and the remainder of the comments in response to question 6 that there is no compelling reason to abandon our intention to proceed with the development of rules under Part 68 to authorize additional options for customer ownership and/or installation of wiring. Our own experience under analogous system wiring rules during the past four years, and the experience of the various states which are now permitting customer ownership and installation of COPW, supports a strong inference that the telephone wiring in fact will be performed properly, under suitable guidelines and constraints. In response to CWA's additional concerns (at para. 6, above) that COPW may cause the loss of jobs, increase costs to consumers, and degrade service, we note that these consequences have not occurred as a result of the federal rules which authorize the use of customer-provided equipment and non-carrier installed premises wiring associated with systems, or as a result of the various state programs which are now in effect. There is no reason to expect that such consequences are any more likely to occur as a result of the futher expansion of consumer options which is inherent in the pro-

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[21] *See* New York PSC Opinion No. 80–1, Case 26894—Interconnection of Customer-Owned Equipment to the Statewide Telecommunications Network, Opinion and Order Authorizing Customer-Owned Premises Wiring, issued January 10, 1980, at 8–9.

[22] As noted, this incident occurred in the context of unauthorized COPW, and creates no inference as to what might occur in the context of a state or federal program. Furthermore, it is unclear whether the noise occurred on the user's facilities (which is not "harm" under Section 3(g) of our rules) or was induced in other subscribers' facilities (which would be "harm"). Continental's differentiation of "network harm" from the harm claimed in this incident suggests the former.

posals made herein. Indeed, new industries spawned as a result of the registration program may be increasing the opportunities for persons skilled in telephone technology and craft skills. In sum, our conclusion in the *Third Report* that there is a theoretical possibility of harm from improperly installed wiring remains unchanged, but the assumption that this theoretical possibility in fact will occur is, on the basis of experience gained under our system wiring rules and the states' broader COPW procedures, ripe for reexamination. The particular blending of institutional safeguards, technical requirements, acceptance testing procedures and enforcement which was adopted in the *Third Report* need not necessarily be applied today in the system wiring environment to which the current provisions of Section 68.215 were generally addressed, nor in the non-system wiring envirnonment on which this proceeding is focussed. On the other hand, where substantial incentives towards the performance of proper wiring may be created at minimal cost, and with minimal disruption of consumers' flexibility (and carriers' operations), we are not necessarily adverse to the adoption of regulatory requirements which create such incentives, notwithstanding the largely speculative nature of the occurrence of harm itself. In essence, even if the probability of the harm is minimal, if the consequences of such harm are great (though improbable), and if they can be prevented or frustrated at their source at little cost, regulatory procedures which in the final analysis are in the nature of an "insurance policy" may be justifiable.[23]

Question 7: Standards for COPW

50. This final question sought comment on the nature of controls, safeguards and standards that will best avoid the potential harm noted at note 19, above. We also asked that interested parties provide proposed rules.

51. Continental recommends a federal institutional program that follows the Commission's multi-line rules, but which recognizes the different conditions that characterize one and two-line COPW. It urges the Commission to adopt simple and clearly stated separate rules for such wiring that could be supplied to telephone subscribers nationwide. While Continental recommends reference in such rules to NEC and local electrical standards (as does CWA), it views direct incorporation of highly technical detail into publicly disseminated materials to be inadvisable. (Continental Comments at 22–23) Continental's detailed proposals include, among other things, specific provisions for attachment of wiring with adhesive

[23] This type of balancing of such factors is, in principle, no different than the balancing which normally is performed in the legislative and judicial processes which determine apportionment of risk and liability in the tort field, and in formulating final rules herein we shall be guided in part by such principles.

clips, offset changes, bridle rings, and station wire nails; spacing and location of terminal blocks; wire and cable specifications; and assignment of responsibility for wiring. (Continental Comments at Appendix A)

52. GTE suggests that a combination of regulatory techniques similar to those currently embodied in Part 68 would work best for one and two-line COPW. According to GTE, a customer could choose to use hardware protection (a registered protective circuit) or rely on new institutional controls structured like current Section 68.215 of the rules, though adjusted for the less complex one and two line wiring characteristics. GTE states that Part 68 is a preferable mechanism to local telephone company standards to implement COPW. Nevertheless, it favors inclusion of a section patterned after 68.215(d)(4), Building and Electrical Codes, which requires compliance with all local codes, or Article 800 of the NEC, in which no such codes are applicable. GTE also recommends that specific uniform standards be developed through joint industry/consumer meetings conducted under Commission auspices. (GTE Comments at 11–13) AT&T, in its reply, considers such meetings unnecessary. (AT&T Reply at 84)

53. For its part, REA states that small telephone companies and cooperatives are not in a position to issue COPW standards because they would reflect a variety of standards that would lead to confusion among customers. REA urges reference to NEC standards in any COPW program to assure safety. (REA Comments at 15)

54. NTCA recommends that "federal controls" be established, whereas UTC views federal standards as redundant "since the Bell system has set standards and acceptable installation practices . . ." and because local standards are available. (NTCA Comments at 7; UTC Comments at 4)

55. In its comments, AT&T notes that the Commission's multi-line wiring program is based on the concept that the Commission, registrants and installation personnel each has an interest in the viability of the program. AT&T states that its proposals, which are discussed in greater detail below, do not set forth personnel qualifications such as training, experience, and familiarity with applicable local ordinances, tools and test equipment, because the administrative procedures to enforce such institutional requirements, given the potentially large number of installations, would be unmanageable. AT&T considers a less rigorous program that establishes standards for materials and workmanship and enforcement procedures to assure compliance with the proposed standards as an adequate balance against the potential of harm to the network.[24]

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[24] We note that the focus of concern with regard to single and two-line wiring is on the kinds of potential harms discussed at paragraphs 45–48, above. Multi-line wiring is considerably more complex and involves greater risks of harmful error associated with billing and interconnection coordination.

Among its other proposals, AT&T recommends a rule to assign direct responsibility for COPW installation on the customer, or his or her agent, and a provision to grant telephone companies certain broad enforcement procedures similar to those currently contained in Section 68.215(g) of the rules. This latter proposal, Section 68.213(h), would allow telephone companies to deny connection, discontinue service, or require protective circuitry in any instance where a COPW installation was substandard due to non-compliance with the material workmanship standards of proposed Section 68.213(e).[25]

56. SPCC opposes AT&T's proposal that would grant telephone companies "extraordinary powers" to enforce the materials and workmanship standards because "the telephone companies may not necessarily be impartial in their assessment . . . ." (SPCC Reply at 9) SPCC would rely on inspection of all COPW by a building inspector, or local telephone company, both of whom would use the NEC standards for safety.

57. AT&T also proposes to ensure that customers have actual notice of all COPW requirements and conditions by requiring manufacturers of wiring materials, or their agents, to provide their purchasers with copies of the Part 68 rules governing materials and workmanship standards and purchasers' legal responsibilities. (*See* proposed Section 68.213(e) in attached Appendix A.) AT&T states that its rule proposals are derived from existing telephone company practices for installing one and two-line premises wiring. (AT&T Comments at 100) AT&T also proposes that once a COPW installation is completed—in compliance with Part 68 standards—the customer would be required to provide written notification to the telephone company attesting to compliance with part 68. AT&T also would require indemnification of the telephone company for any harm to the network caused by a customer's failure to comply with the requirements of Part 68. (*See* proposed Section 68.213 in attached Appendix A.) In its reply comments, Continental supports AT&T's written notification proposal. IDCMA opposes the indemnification provision in AT&T's proposal because it would "protect the telephone company against any claims where the injury resulted in whole or in part by the customer's negligence or that his agent." IDCMA would not completely immunize the telephone company from liability merely because a customer's negligence contributed partially to an injury.

58. *Discussion.* Nearly all the parties commenting on question 7 favor uniform national rules for non-system COPW that are generally patterned after our existing Section 68.215 rules, with appropriate changes recognizing that the bulk of such wiring is not as complex as system wiring (and therefore might be performed by consumers). AT&T and Continental offer preliminary rule proposals. There is a clear consensus

[25] *See* Appendix A for the specific rules proposed by this Notice.

that federal rules should govern material and workmanship standards, and that local codes including Article 800 of the NEC should apply to wiring installations. We agree with the parties' consensus that responsibility for installing, maintaining and grounding station protectors at the demarcation point should remain with the serving telephone company, and that responsibility for harm caused by customer installed wiring should rest with the subscriber (subject, of course, to any indemnification or warrantees which might flow from a previous or current owner or installer of the subscriber's COPW). An additional consensus view of the parties that the existing rules in Section 68.215 should not be altered to encompass non-system (i.e., one and two line) wiring, primarily to minimize potential confusion to residential consumers if such rules are widely disseminated, creates problems which we address below. It appears that the thrust of parties' contentions on this point is not that the legal framework established for system and non-system wiring need not be consistent, a result which would be assued through adoption of a unified wiring rule, but rather that consumers not specifically trained in writing techniques might be confused if a more comprehensive rule were disseminated to them than might be required for their relatively simple one and two-line (non-system) installations.

59. As noted, AT&T and Continental submitted specific rule proposals which, in terms of wiring and materials technical standards, are patterned after the existing provisions of Section 68.215. A minor change that is proposed is that requirements governing the separation of telephone wiring from other forms of wiring (which is already specified in the electrical codes incorporated by reference in Section 68.215) be published specifically in our rules. While such information is legally superfluous (since the requirement is already incorporated by reference), it is basic to the proper performance of telephone wiring, and we propose to incorporate a conductor separation table in our wirting rules. With this change, we are proposing to apply the existing wiring and materials standards of Section 68.215 to the non-system wiring environment. Other elements of the existing Section 68.215 structure which are generally proposed to be applied in the non-system wiring environment include use of the existing procedures for acceptance testing for imbalance (Section 68.215(f)), notice to the local telephone company (as a variant on the documentation procedures of Section 68.215(e)), and extraordinary local telephone company rights (with some controversy, as addressed below). The major difference in approach between the existing system-directed procedures of Section 68.215 and the non-system focus of this proceeding relates to qualifications of the personnel who actually will perform wiring (or to their supervisors). Section 68.215(c) currently requires some demonstration of skill (*i.e.*, either through authority form our registrants or supervision by a licensed professional engineer); the parties generally argue in favor of

dispensing with such demonstration, and instead seek to utilize potential liability for any mishaps which might occur as a means of creating incentives towards proper wiring, without using an explicit mechanism to determine the qualifications of those who perform such wiring.

60. Thus, AT&T proposes assignment in our rules of subscriber responsibility for any network harm which might result from a failure to comply with any workmanship/materials requirements for wiring which we might adopt. It proposes further than there be indemnification and exculpation in favor of the local telephone company.[26] Our tentative view is that an expression of subscriber responsibility for this purpose is adequate, and that remedial resolution of potential liability should be controlled by normal tort and contractual law principles.[27]

61. Our existing notice/documentation requirements in Section 68.215(e) require that certain information be furnished the local telephone company in written affidavit form, to give the carrier a fair opportunity to determine whether it might wish to invoke the extraordinary procedures of Section 68.215(g), including monitoring or participation in acceptance testing for any reason at the time of initial installation or wiring. To minimize paperwork burdens on carriers, they are not required to maintain the information which is provided under Section 68.215(e). Rather, the subscriber is required to maintain a copy of this documentation at the involved premises, where it will be available for reference in the event of problems or disputes. In this proceeding, where we are considering less complex non-system wiring than the system wiring to which existing Section 68.215 is primarily directed, AT&T has proposed that information similiar to that required in Section 68.215(e) be provided the local telephone company in written form, but not as an affidavit. While we have received no complaints about our existing procedures[28], we believe that a written notice requirement for wiring by a consumer, particularly in the consumer's home or small business (which probably would comprise the bulk of non-system COPW), would be unnecessarily burdensome. The oral notice requirement of Section 68.106, which governs the equipment (but not the wiring) under our existing rules, has proven adequate inasmuch as the carriers have adopted procedures for recording such

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[26] AT&T's tariffs already seek this result, and it apparently is seeking explicity Commission sanction through its rules for this position. *See, e.g.*, Tariff F.C.C. No. 263, Message Telecommunications Service, Section 2.6.1.A, 24th Revised Page 16, effective May 19, 1980, and similar provisions in other interstate tariffs.

[27] It would appear that in the common circumstance where installers will be installing wiring for the subscriber, rather than the subscriber personally performing such installation, a more important indemnification issue from the subscriber's perspective might be indemnification of the subscriber, rather than of the telephone company as is proposed by AT&T.

[28] We have encouraged the industry to adopt procedures cooperatively to minimize the flow of unnecessary paperwork. Such procedures are employed generally so that the burdens associated with our documentation requirements appear minimal.

information when received orally. Our tentative view is that oral notice similarly should be sufficient for non-system wiring, and we propose to require that the information similar to that which is required to be given the telephone company in writing in Section 68.215(e) be provided orally for non-system COPW.

62. Application of the existing extraordinary telephone company procedures of Section 68.215(g) to non-system COPW has been proposed by AT&T and Continental, and opposed by SPCC on the theory that "telephone companies may not necessarily be impartial in their assessment" of wiring adequacy. We must point out that we are as aware of this possibility today as we were when we adopted such procedures in the *Third Report*, *supra* at 1280–82, 1285–7, and we believe that we have adequately provided disincentives for abuse of authority. For example, when the extraordinary procedures are invoked, the carrier is required to "inform the customer of the right to bring a complaint to the Commission" to ensure that we have an opportunity to assess whether the procedures are being abused. Although Section 68.215(g) has been effective for almost 4½ years, we have not received a single such complaint, and it is fair to infer from this that there has been no abuse. Particularly in the circumstances we are considering, where our institutional procedures for assessing the qualifications of the installers, *i.e.*, Section 68.215(c), might be weakened as a result of this proceeding (discussed below), we believe it inappropriate to similarly weaken the extraordinary remedies of telephone companies now in Section 68.215(g). SPCC's proposed alternatives, that there be a requirement for mandatory inspection of telephone wiring by local electrical/building code enforcement authorities, while perhaps workable in some circumstances, would appear to create more problems than it solves. First, it is unclear that local authorities necessarily would have the resources (or the desire) to inspect COPW, nor would they necessarily have the expertise to do so; while telephone wiring is similar in many respects to power wiring, there are differences, and local authorities might be unfamiliar with the former. Second, telephone companies are subject to our jurisdiction if they abuse their extraordinary privileges; local authorities probably would not be, and subscribers might have no adequate remedy if the result of an inspection were improperly adverse. And third, it is not clear that local authorities necessarily would have the ability to perform such inspections with the type of expedition which often is required for telephone services. In view of these considerations, we are rejecting SPCC's proposal that mandatory local inspection be used in lieu of the carriers' extraordinary remedies.

63. *Installers' qualifications.* As was noted for the system wiring environment addressed in our current Section 68.215 rules governing unprotected wiring, we previously adopted procedures intended to ensure that installers are qualified, *i.e.*, that installations be responsibly

supervised by an individual with training and authority received from equipment registrants or by a licensed professional engineer. In recognition that one and two-line non-system wiring involved here will ordinarily be simpler than system wiring, comments in the inquiry phase of this proceeding have argued in favor of dispensing with such requirements. This approach would also be consistent with the various state programs for COPW which similarly do not have mechanisms for identifying qualified installers.

64. Such an approach may have merit, but, if the corresponding requirements for system wiring were not also changed, an anomalous result could be reached. In the system wiring environment, because of the complexity of the installations and market considerations, only competent installers will normally perform the work, regardless of our rules. In the simpler, non-system environment, untrained residential and small business subscribers to some extent might be expected to perform the work themselves. Thus, the net result of following the approach of the comments before us, *viz.*, of leaving the current system wiring rules unchanged (including the installation supervisors' qualification requirements) while dispensing with qualification requirements for one and two-line non-system COPW, would be to continue to impose such a requirement where it may be unnecessary as a practical matter, while not imposing it in circumstances where it might better be justified. We believe that there are several midground positions available which would not create this potential anomaly.

65. Furthermore, we have two petitions before us that seek changes in the Section 68.215(c) installation supervisors' qualificaiton requirements. First, the Department of Defense, Defense Communications Agency, (DCA) is seeking acknowledgement that military personnel are prepared by military vocational training to install wiring properly, and DCA accordingly is seeking recognition of such training as an alternative to training and authority received from an equipment registrant. Second, the County of Riverside, California (Riverside) recommends that those who have completed a course in telephone installation and maintenance in the military, or those who possess an FCC General Operator's license, should be permitted to perform unprotected system wiring operations. Riverside also wishes us to institute new examination and licensing procedures, similar in principle to licensing of radio operators, to identify qualified installers of COPW.[29] The problem might become particularly

[29] There is no showing that such a program necessarily could be relied upon to assure that no harm would be caused to the network or third parties by those so licensed, nor is the Commission during this period of economic restraint inclined, absent a compelling justification, to embark on the establishment of a complex new licensing scheme. In short, Riverside has not shown that there is a compelling justification to establish a new licensing program for telephone wiring installers. We will therefore reject its petition as to this proposal.

acute if we were to fail to grant relief to DCA for system wiring, contemporaneously with dispensing with qualifications requirements for installers or supervisors for one and two-line non-system COPW where there may be a greater possibility of improper wiring (as a practical matter).

66. Several rational options are available to minimize any such anomalous results while providing appropriate protection to the telephone network. First, we could simply "umbrella" the licensing/qualification requirements of local electrical and building codes and state regulatory options for all forms of COPW, system and non-system. That is, to the extent that local or state jurisdictions require the installation of power wiring by licensed electricians, such licensed electricians might similarly be required to install COPW. Telephone wiring is analogous to power wiring and low-energy signaling wiring which currently is performed under the National Electrical Code (and similar local codes), and demonstration of competence to perform power wiring would likely similarly demonstrate competence to perform telephone wiring. If a local jurisdiction has owner/occupier wiring privileges in force for power wiring, *i.e.* an owner/occupier may perform power wiring without an electrician's license (and, usually subject to inspection by local authorities), such privileges would apply to simple telephone wiring installations, for example installations by residential subscribers. If state regulators in a given jurisdiction were to adopt more liberal procedures, *e.g.*, that anyone might install one and two-line non-system COPW in that jurisdiction, this too would automatically be accommodated under this approach. But, absent local owner/occupier wiring privileges or state regulatory wiring privileges, the federally-granted right would be limited to wiring by licensed electricians and those groups accommodated in our rules currently. This approach has the advantage of utilizing an existing licensing/examination structure to identify qualified wirers, and to create incentives towards proper wiring, but without the administrative expense of creating a new such structure—a result which we have consistently avoided in this field—and without imposing excessive expense or burdens on consumers[30].

67. A second option might be to limit the potential exposure to harm of wiring performed by those who have not demonstrated competence to perform wiring properly, while retaining a more complete range of wiring options to qualified installers. For example, if one and two-line nonsystem wiring by the untrained were limited to surface wiring (wiring attached

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[30] While entry is somewhat limited in the electricians' markets because of licensing, the field would appear to be competitive in most jurisdictions, which would minimize opportunities for extracting excessive charges for performance of wiring. However, under this approach, unless owner/occupier privileges or regulatory permission exists in a jurisdiction, subscribers themselves would be denied the right under federal rules of performing their own wiring operations.

to the surface of a structure, and not embedded within its walls and floors) and, perhaps, to being pulled through previously installed ducts dedicated solely to telephone wiring, the potential exposure of such wiring to contact with earth ground or power wiring ("harm") would be insignificant. While this might be viewed as somewhat restrictive, it might be noted that telephone companies today largely limit premises wiring to surface wiring or wiring pulled through pre-existing ducts, unless the wiring is installed during construction, consumers would not appear to be in a materially different position under this approach than they are today if the carrier installs the wiring. Furthermore, this option might reasonably be combined with the previous option, which would ameliorate any differences which might arise when a building is under construction as electricians would be present during construction in any event, and could easily install telephone wiring at the same time they install power wiring.

68. A third option might be simply to accept the anomalous result of following the parties' comments, *i.e.*, of continuing to require demonstration of qualifications for installation of system wiring, while dispensing with such a demonstration for installation of one and two-line non-system wiring. The disparate treatment of the two forms of wiring might be justifiable in terms of the complexity of system wiring, and the relative simplicity of non-system wiring.[31]

69. In sum, we believe that these issues have not previously been explored in depth in the comments filed pursuant to our NOI herein, and we accordingly request the submission of comments focussed on the three options set forth above. Based upon such comments, we will promulgate final rules addressing installer/supervisor qualifications both for system wiring and one and two-line non-system wiring.[32] Furthermore, while we are not proposing herein to grant DCA precisely the relief it seeks in its petition, we believe that one or more of the options described above, if adopted, would satisfy its underlying concern regarding Section 68.215(c).

70. *Acceptance testing.* In view of the possibility that, as an outcome of this proceeding the current techniques for assuring the competence of installers or supervisors of wiring may be made less stringent, acceptance testing during inital installation of wiring may take on increased importance as a means of differentiating good installations from poor ones. Our current Section 68.215(f) requires that wiring be tested by the installer during installation for freedom from imbalance, essentially by

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[31] A fourth possibility might be a requirement that installers secure bonding to indemnify subscribers or carriers for improper wiring. Comments on this option would be useful provided a bonding requirement can be proposed that would be consistent with the statutory scheme of the Communications Act.

[32] Notice is hereby given that, pursuant to the foregoing description of the subjects and issues involved, final rules related to these issues will be adopted.

ensuring that dial tone can be broken and by listening for hum. During initial installation of wiring, telephone companies are free to monitor or participate in such acceptance testing routinely; thereafter, they are only permitted to do so as an extraordinary procedure requiring a rational basis to believe that there is a problem. *See* Section 68.215(f) and (g)(1)–(2). We believe that such procedures should similarly apply to installation of one and two-line non-system wiring.

71. Another form of acceptance testing may be desirable, both to telephone companies and consumers. This is reverting-calling (or so-called "ringback") testing, which normally is employed by telephone company installation personnel, and which verifies both the operation of the wire and of functions of installed terminal equipment (specifically, off-hook/on-hook, dialing and ringing). In essence, after an installation has been completed, a telephone company installer today dials a reverting-calling number and after appropriate signaling hangs up. Thereafter, the line automatically returns ringing signaling (if the line is free of contact with earth ground and other aberrations) from the central office until the off-hook state occurs. This capability, which we understand is generally available[33], would be useful to installers, particularly to untrained ones, as a means of permitting them to verify whether an installation is working. It also would provide some assurance that inadequate installations would expeditiously be corrected without exposing the telephone network to harm.

72. At a minimum, performance of such "ringback" testing will to some extent stress insulation at the time of the wiring installation (no differently, of course, than the normal stress of an incoming call's ringing signal). The peak voltage with respect to earth ground can reach approximately 230 Volts during ringing, a level which might be sufficient to assure immediate failure (and correction) of marginal installations. Furthermore, it might be rational to employ more manual "ringback"-type testing initiated from a central office test desk to assure that the telephone company is aware of any failures, to assure correction. If this approach were followed, it might be sensible to permit the telephone companies to utilize stress-testing voltages, rather than normal ringing signals, to assure a failure of marginal installations. It might be noted that our rules (and similar NEC requirements) specify a 1,500 Volt breakdown rating for telephone wire; stress testing levels ranging between normal ringing voltages and this higher breakdown limitation might be reasonable.

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[33] Even the smaller rural telephone companies normally have reverting-calling capabilities in their equipment to permit party line subscribers to dial other parties sharing their line. Larger urban telephone companies have such capabilities for installation testing purposes.

73. In sum, we propose to require that "ringback"-type testing capabilities be made available for acceptance testing of one and two-line non-system wiring, and that installers of such wiring be required to perform such acceptance testing. We believe that this approach will have utility to subscribers, will minimize (and assure immediate correction of) harm, and will be valuable to carriers as well in that telephone company operators will be free of requests of "ring my telephone." In the final analysis, telephone company installers today are utilizing such test procedures, and we believe that the carriers should not discriminate between their own installers and others in making such capabilities available."

Specific Rules

74. As noted, several parties have sought the adoption of a new rule which is limited to one and two-line non-system wiring, so that such a rule may be disseminated to subscribers without confusing them with additional wiring requirements related to system wiring. In principle, we are not opposed to doing so, provided that it is understood that we regard one and two-line wiring as but a special case of the wiring requirements addressed more generally in Section 68.215. Although we propose to adopt a separate rule, many of the substantive provisions of such a rule should be copied verbatim from Section 68.215. Specifically, we propose to adopt provisions in Section 68.215(d), (f), (g) and (h) unchanged. We also propose to adopt an oral notice (to the telephone company) requirement in lieu of Section 68.215(e). We have set forth several options which might individually or in combination be used in lieu of (or in addition to) provisions of Section 68.215(b) and (c), and based on the comments we receive we will adopt appropriate provisions related to installation personnel of supervision both in the new rule and Section 68.215. And, we have proposed the adoption of an additonal "ringback"-type acceptance testing provision, which might be added to the provisions of Section 68.215(f). Finally, we are proposing to add both to Section 68.215 and to the new rule a specific new table relating to separation of telephone wiring from other forms of wiring (see Appendix A).

75. In addition to the foregoing, which would represent specific rules, we note that if we pursue that path of permitting one and two-line non-system wiring to be installed by the untrained, it might be desirable to give them some advice. For example, Section 68.215(d)(6) requires wiring to be "protected from adverse effects of weather and the environment in which it is used." This requirement has meaning to trained installers, who understand that appropriately waterproofed cables should be used in damp locations and high temperature cables should be used in locations with high ambient temperatures, for example, but it likely would have little meaning to the unsophisticated. We would prefer not to adopt the electrical code approach of specifying every potential type of insulation as

a function of ambient conditions, and that is the reason why our current approach of specifying an end result—without detail on means of getting there—was adopted. We note that in analogous state programs, and in the telephone companies' proposals herein, advice was proposed to be given in the rules. One example of this was a proposed rule provision as follows:

> Judgment should be used in selecting the locations for placement of COPW. The following are examples of locations which should be avoided.
> - Damp locations.
> - Wire runs which provide support for any objects.
> - Excessively hot locations, steam pipes, heating ducts, hot water pipes, etc.
> - Locations where wires will be subjected to abrasion or corrosion.
> - Areas between structural studding where electrical power wiring is present[34].
> - Areas above suspended ceiling used for return air plenums.

Our problem is that such "should be avoided" precatory language may lead unnecessarily to controversy as it would be unclear whether it would publish requirements or mere suggestions, and, in individual circumstances, it may be unnecessarily restrictive. Yet there is considerable merit to advising the unsophisticated that such installations could cause problems.

76. We therefore propose to adopt a "simple installations" rule provision along the lines of the following, to avoid unnecessary restrictions while providing appropriate advice to those not specially trained:

> *Simple Installations*. COPW should be placed where it will not be broken or detached, and it should suitably supported by means which do not affect the integrity of the wiring insulation. Wiring which conforms to the following guidelines will be proper; if it is desired to deviate from these guidelines, advice should be sought from the supplier of the COPW or the local telephone company to determine whether the wire or proposed installation will be suitable:
>
> (1) The following locations may not be suitable for all forms of telephone wire, because of the characteristics of the insulation of such wire, and should be avoided in simple installations:
>
> (i) Damp Locations.
> (ii) Wire runs which provide support for other objects.
> (iii) Excessively hot locations in proximity to steam pipes, heating ducts, hot water pipes, etc.
> (iv) Locations where wires will be subjected to abrasion or corrosion.
> (v) Areas above suspended ceiling used for return air plenums (refer to local electrical code provisions which may restrict or limit any wiring in such locations).

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[34] This restriction would appear wholly unnecessary. No conductor separation at all is required between telephone wiring and all current forms of power wiring used in premises where one and two-line non-system wiring is likely to be installed (*i.e.*, wires in conduit, armored or nonmetallic sheathed cable), yet this advice would restrict the installation of telephone wiring in the same 16 inch (standard) stud space with such power wiring.

(2) COPW should follow structural members such as joists or studs. It if becomes necessary to route wire perpendicular to joists or studs, bored holes through the center of such members are a preferred method of providing support. If it becomes necessary to span the lower edge of joists, run the wire no more than five (5) inches (127 mm) from a wall to avoid possible damage to the wire.

(3) Wherever conduit (or other ducts) is available or is required by applicable codes for telephone wiring, it may be used soley for telephone wiring (or for nonhazardous voltage sources), and may not contain other electrical wires.

It should be emphasized that installations which follow such guidelines will be proper, but other ones which violate such guidelines may also be proper. For example, wiring which is insulated with an appropriately waterproof material might properly be used in a damp location notwithstanding the guidelines. We do not intend to foreclose such used, and we would regard a rule provision such as this as placing the untrained installers on notice that they may need to get advice on such an installation. In light of our concern that any such rule not be interpreted as unnecessarily restricting installations which, under proper circumstances, using proper materials, might be entirely appropriate, we request comment on this proposal, and on further refinements if necessary to emphasize this point.

Registration of Wire

77. The final issue on which we seek additional comment concerns whether or not we should register wire itself. In the *Fourth Report*, *supra* at 1812–15, we analyzed the treatment of extensions, adapters and cross-connect devices and concluded that such devices are directly connected "to the telephone network," and that terminal equipment connected to such devices are also connected "to the telephone network," within the meaning of our Docket No. 21182 decision. Consistent with that conclusion, we subjected extensions, adapters and cross-connect devices to an abbreviated form of registration, to assure that such passive devices are adequately insulated. While we have proposed eliminating the abbreviated registration process for these devices in the NPRM (*supra* at 879–881), an analogous approach may remain useful for assuring the adequacy of generic wire, *i.e.*, non-connectorized wire, etc., used with one and two-line non-system COPW.

78. In the *Fourth Report* we adopted specific wire insulation requirements in Section 68.215(d)(2) (a 1500 Volt breakdown rating), and require that documentation be given the telephone company which demonstrates that any such wire will likely conform to such requirements, Section 68.215(e)(7). Thus, rather than registering the wire itself, we adopted a procedure under which the telphone companies might, to some extent, evaluate the wire proposd to be used in an installation. This result was warranted because, as a practical matter, system wiring is normally

performed using standardized multi-conductor cables used ubiquitously in the telephone and computer fields, and the marketplace realities dictated towards the use of quality cables. In essence, substandard wire did not appear to be available because of the marketplace realities of the telephone and computer fields, and in any event would not be used.

79. However, here we are addressing one and two-line installations which might be performed using two, three and four conductor cables. Inappropriate cables are available (*e.g.*, "zipcord"-type appliance wire, speaker wire, thermostat wire, bell wire, etc.) that might improperly be used for COPW by those not specifically trained. Furthermore, there is some possibility that substandard cables, specifically denoted as "telephone wire," might be manufactured and broadly made available to consumers. In both such circumstances, the extraordinary remedies available to telephone companies might alleviate some potential problems, but as a practical matter we have viewed such remedies as appropriate for *exceptional* cases, and not as broadscale remedies for problems which can, and should, be prevented at the outset through the registration process.

80. In view of these considerations, we propose an abbreviated registration procedure directed towards assuring conformance of the wire with the 1500 Volt breakdown rating which currently is specified in Section 68.215(d)(2) and which is proposed to be applied, by a new rule, to one and two-line non-system wiring. In view of the practical factors addressed previously, we propose to limit such a registration requirement to less than twenty-five pair cables, and not subject twenty-five pair (or greater) cable to registration. Furthermore, it should be noted that in the event that we require registration of such wire, the registrant (like other registrants would be subject to the requirement of Section 68.218(b)(1) of providing instructions concerning installation of such wire. While we would regard this as potentially desirable as a means of disseminating such information to those not specifically trained (should we ultimately permit wiring installation such persons), it might be unnecessary if we ultimately restrict installations to electricians, as was proposed optionally herein. We invite comment on this proposal.

Additional Matters

81. Several aspects of COPW remain to be discussed. Among these are the limitation of customers' rights to purchase or add to existing wiring, and NTCA's comment concerning the requirement that COPW be used only with customer-provided terminal equipment (CPE).

82. *Customers' rights.* At this time the deregulation of inside wiring is the subject of Docket No. CC 79–105 and proceedings at the state level. The rule provisions that may be adopted in this docket are not intended to provide telephone customers with a right to purchase their existing

premises wiring. Rather, customers who choose to augment existing wiring or install entirely new wiring (in place of existing wiring or in new structures) will be able to do so when standards are adopted in this docket. However, the definition of demarcation point we adopt in this proceeding will serve for purposes of Docket No. CC 79–105 and all other Commission decisions that require a legal definition for the point of demarcation between carrier lines and inside premises wiring.

83. *CPE and COPW.* In its comments, NTCA suggests that decisions regarding wiring should not be made without consideration of terminal equipment. It urges that a telephone service customer should be given the option to provide wiring only if that customer provides all terminal equipment. (NTCA Comments at 7) We do not agree. The use of leased or customer-owned terminal equipment, either of which would have to be harmless under current Part 68 rules if directly connected to the network, bears no relation to the ownership of inside premises wiring. Accordingly, we reject NTCA's suggestion.

II. Party Line Service

84. In the NOI, we traced the history of the exclusion of party line service from Part 68, noting that in earlier equipment interconnection proceedings the necessary techincal criteria simply had not as yet been developed. As an interim measure, the Commission had allowed terminal equipment to be connected to party line service in accordance with carriers' existing local tariffs. *See First Report and Order* in Docket No. 19528, 56 FCC 2d 593 (1975), at 599–600, n. 7. The impetus to proceed at this time with consideration of party line service under Part 68 stems from our decision in the reconsideration of *Computer II* to include party line terminal equipment within "CPE." *See* 84 FCC 2d at 70. We announced there our intention to examine in a separate proceeding what network and subscriber safeguards may be necessary to accommodate CPE in conjunction with party line service. We initiated an inquiry that offered two possible approaches to such accommodation: (1) to develop the necessary technical and procedural standards, or (2) to adopt a program that recognizes existing standards and relies in some fashion on local telephone companies for ringing and billing compatibility. We also expressed concern that the attendant technical and practical difficulties associated with these approaches might not be warranted. *See* NOI at 902. Finally, we described the operation of party line service, including the features that distinguish it and associated terminal equipment from

other MTS network services, *viz.*, selective ringing[35] and calling party number identification.[36]

85. Most comments on the party line issue emphasize that coordination of terminal equipment design standards, given the variety of party line services currently in use across the nation, would require, at the least, considerable further study and, ultimately, promulgation of detailed technical rules. Several parties urge FCC/industry meetings to develop these rules. Continental states:

> . . . The coordination problems associated with continuous provision of reliable party line service are significant, even when all of the terminal equipment is supplied by the serving common carrier. . . . [W]e see an enormous administrative and technical burden associated with maintenance of viable party line service in such an environment. (Continental Comments at 35–7)

AT&T adds:

> The number of different techniques currently used by the operating companies to accomplish selective ringing and the variations in methods used to provide calling party number indentification would produce technical and procedural standards that could impose added administrative burdens on manufacturers and users . . . [and] telephone companies. (AT&T Comments at 113)

See also NTCA Comments at 8, and GTE Reply at 9. According to AT&T, a "full" selection of party line terminals would include: tip party terminals with a 1000 Ohm tip ground for central offices with ANI equipment recognizing a 1000 Ohm tip ground for billing; tip party terminals with a 2650 Ohm tip ground for use in central offices with ANI equipment that recognizes the 2650 Ohm ground for billing; one ring party terminal with the ringer wired to ground; four distinct terminals for 4-party service, with one recognizing negative ring battery, one recognizing positive ring battery, one recognizing positive tip battery, and one recognizing negative tip battery. (AT&T Comments at 114) In short, every model of equipment intended for use on party line service would be designed in response to the customer's tip and ring polarity, ringing codes, and

[35] Selective ringing is a means by which an incoming call on a local loop common to several party line subscribers may be directed to just one of those subscribers. There are three techniques generally used. In a selective repetitive ringing system, each subscriber on a common loop responds to a coded ringing sequence, *e.g.*, one long ring repeated is recognized as a call for subscriber A, whereas two short rings repeated alerts subscriber B of an incoming call. The second technique, selective frequency ringing, involves the use of audio filters in a subscriber's terminal equipment that permits ringing when the telephone company transmits the appropriate ring frequency, *e.g.*, 20 Hz for subscriber A and 33 Hz for subscriber B. The third technique incorporates tip-ground and/or polarity differentiation.

[36] Calling party number identification assures that the party line subscriber initiating a toll call is billed for the call. Either operator number identification (ONI) or automatic number identification (ANI) techniques may be used. In the former, an operator intercepts the calling party and requests his or her telephone number. ANI may involve a spotter dial, *i.e.*, an encoded cam that automatically reports the calling party's number to the telephone company, or any of several polarity protocols.

distance to the telephone company's central office. With a view toward implementation, GTE suggests a matrix of party line service codes to identify these customer service/equipment parameters. (GTE Comments at 14–16)[37] According to GTE, this would ease problems of subscriber-telephone company coordination at the time of connection and in the event of trouble. However, neither GTE nor any other party offered specific technical rule proposals in response to the NOI.

86. Aside from these technical complexities, several parties warn that party line equipment interconnection may occasion a variety of "new" potential harms to the network. Among these are billing discrepancies, inappropriate ringing, inability to dial out, and hazards stemming from interference with other users' service, particularly during emergencies. Continental, for example, views the probability of service interruption to other customers from malfunction or incompatibility as substantially increased, and terms inclusion of party line service under Part 68 a "significant step beyond the bounds of the current program." (Continental Comments at 26–7) For its part, USITA expresses concern for the "life threatening" effects of one subscriber's malfunctioning device on other subscribers on the shared party line. (USITA Comments at 3)

87. Several parties suggest that the need for party line rules under Part 68 will abate with the continuing decrease in the number of party line customers nationwide. AT&T estimates this decrease to be in the order of 10% per year. (AT&T Supplemental Comments at 27) UTS reports that it had 686,221 party line customers (28% of total main stations) at the end of 1978, 604,457 (22%) at the end of 1980, and 531,851 (18.5%) at the end of 1981. REA, at the end of 1980, had some 875,400 party line subscribers, but it is endeavoring to convert to private service. (REA Comments at 3–4) NTCA notes that REA has reduced the number of 8-party service from 103,000 to 70,000 during 1980, a reduction of 32%. (The total REA party line service reduction was 7.6%.) Continental reports that as of April, 1981, 25% of its main stations were party line. It projects a reduction in its party line subscription, but anticipates "substantial" 4-party service past 1984. (Continental Comments at 29) Some 4% of all main stations in this country are served by party line service.

88. REA suggests that (1) Part 68 should include party line service; (2) the customers should be responsible for compatibility; (3) the telephone company should advise customers on the equipment needed for compatibility; (4) all costs associated with compatibility should be borne by the customer; and (5) the responsibilities of the telephone company and the customer should be set forth. (REA Comments at 2) NTCA shares these views, but, like GTE, urges the use of industry meetings to develop a workable approach. For its part, New York argues that without Part 68

[37] GTE's proposed matrix has space for 525 entries. (GTE Comments, Appendix at 4)

rules the deregulation of new party line CPE under *Computer II*, *supra*, "effectively means that party line service customers will have no regulatory protection on the rates charged for their party line terminal equipment, nor will they be able to acquire their own equipment." (New York Comments at 3–4) New York suggests that customers be allowed to own party line terminal equipment and connect it to party line service.

89. Purecycle Corporation (Purecycle), which markets home wastewater recycling systems that contain an automated device that places up to 4 short status or alarm calls daily to a service center, favors a party line registration program for equipment that "originates only," places only local calls, limits local calling to 3 minutes, and does not interfere with other parties' use of the party line, *e.g.*, alarm dialers. (Purecycle Comments at 2–3) Apparently, Purecycle has entered into agreements with a number of local telephone companies to permit direct connection of its devices to party lines. Purecycle also requests that its current and future party line equipment connections should be exempted from current Part 68 rules and future party line rules.

90. Monitor Industries (Monitor), a manufacturer of non-interactive (passive) telephone equipment, suggests a category of party line registration for devices such as status monitors, toll restrictors and the like. Such a category, Monitor urges, could be included under Part 68 "without waiting until the difficulties have been resolved of registering interactive equipment—and without subjecting it to procedural complexities that may be appropriate for interactive equipment." (Monitor Comments at 2) According to Monitor, even these "harmless" devices are generally not permitted direct connection by telephone companies.

91. Other parties express concern about the use of certain kinds of interactive terminal equipment on party line service. For example, Continental notes that answering machines, which do not sense ringing frequency, and automatic dialers, which do not necessarily provide number identification, create special problems when used with party line service. (Continental Comments at 34–35; AT&T Supplemental Comments at 24–27)

92. The second approach suggested in the NOI would require local telephone companies or their agents to accept responsibility for compatibility operations. The thought was to require telephone companies to establish and publicize the technical criteria for party line equipment interconnection and to condition such connection on compliance with those criteria. In effect, this would delegate party line interconnection management to the local telephone companies. They would be obligated to interconnect compliant customer-provided terminal equipment, but they would be free to set their own technical standards and procedures, including conditions for interconnection refusal. By this approach, each telephone company's unique party line parameters would be maintained,

with local technical consistency assured. Of course, any unreasonable standards or procedures could be challenged and corrected under the relevant provisions of Title II of the Communications Act.

93. A variant of this approach is discussed by AT&T. Following examination of an array of alternatives, including a two-wire conversion interface, a four-wire conversion interface, a factory pre-wired and fixed party position terminal integral to the telephone, and an adaptation program, AT&T concludes that the least objectionable alternative would be to register modifiable telephone sets that could be customized by either the telephone company itself (a deregulated subsidiary in the case of AT&T) or an authorized independent provider. But, AT&T states, ". . . new registration rules would be required in order to specify, with particularity, the physical and electrical characteristics . . . ." (AT&T Supplemental Comments at 19–23) As to conversion devices, which underlie its other alternatives, AT&T notes that "[T]he [conversion] device . . . does not exist . . . [and], considering the continuing decline in party line services in the Bell System, the question of whether the development of such a device would be worthwhile needs to be addressed . . . ." (AT&T Comments at 116–17)

94. *Discussion.* In considering the development of new rules and procedures to accommodate party line service under Part 68 (our first approach in the NOI), we are confronted with three problems: technical variation, administrative impracticality, and harm.

95. As discussed above, the number of possible party line equipment and system configurations is in the hundreds. There are variations from one area of the country to another within areas, and among telephone companies. Reconciling these variations through the promulgation of a unified set of technical-legal rules would entail a formidable administrative undertaking by this Commission. Implementation would impose a comparable, if not greater, burden on telephone companies and party line subscribers. Each telephone company would be responsible for applying the rules to its party line system, and every subscriber, on moving or attempting an equipment change, would be confronted with a technically and procedurally complex set of compatibility requirements. Apparently, recognition of these difficulties discouraged parties from proposing a unified set of rules.

96. With as many as eight parties sharing a party line,[38] improperly installed or malfunctioning terminal equipment could affect many more people than just the user of the equipment. Automatic answering machines, like telephones, would have to be designed to respond only to calls addressing the user of the machine. Otherwise, they would operate

[38] AT&T notes the existence of circuits with up to 20 parties, but these are apparently quite rare. (AT&T Supplemental Comments at 5)

whenever any party on the line were called, infringing on that other party's privacy and possibly causing the caller unnecessary billing. Automatic dialers, which present a slightly different but equally significant problem would require special circuity to automatically relinquish the line on demand of another party. Such ciruitry would be critical in emergency situations. Any damage by any such automatic device to a party other than the user could subject the user and/or manufacturer to considerable financial liability. These risks of third party harm, in addition to those associated with ANI failures and other network related faults, constitute a substantially increased array of potential harms than those generally associated with single party service.[39] Our concern, then, is not only with the feasibility of developing, administering and implementing new rules, but with public safety as well.

97. We also note that nationwide the number of party line subscribers is decreasing annually as technological advances provide the means to bring private service to nearly everyone. While party line service will remain an adjunct to private telephone service for the foreseeable future, its relative significance will continue to diminish.

98. Taking all of these factors into account, we conclude that the benefits attributable to including party line sevice under Part 68, by promulgating a complex set of technical and procedural regulations, are outweighed by: (1) the administrative burden on the Commission, party line subscribers and telephone companies. (2) the additional potential harms such inclusion portends, and (3) the decreasing number of persons who would benefit from adoption of such rules.

99. Alternatively, generally requiring local telephone companies to accept responsibility for compatibility operations received scant support and did not evoke any substitute proposals. Even equipment manufacturers, who presumably would have strong incentives to see the party line market open to their products, offered no support. Part 68 was predicated on a required set of interconnection standards that would apply to all telephone companies and all MTS/WATS (and certain private line service) customers. It was adopted to overcome unreasonable telephone company restrictions against the attachment of privately beneficial devices to the telephone network by assuring that such devices would not cause harm. Unreasonable interconnection criteria by telephone companies have been avoided through promulgation of national standards under Part 68 (reflected in local traiffs) and continuing Commission oversight. We believe that abandonment of this regulatory control through unfettered delegation of interconnection control to the telephone companies would be unwise. The risk is that some telephone companies would invoke unreasonable connection criteria or develop inconsistent standards. Morever,

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[39] *See* n. 19, *supra*.

we are not convinced that requiring the telephone industry to develop universal, modifiable telephones or a system of conversion devices is either practical or advisable. Accordingly, we also reject this approach to party line accommodation.

100. We acknowledge that the small percentage of party line service subscribers who might wish to attach their own devices to the telephone network may continue to be frustrated by prohibitive provisions in local traiffs. Our decision not to proceed with accommodation of party line sevice under Part 68 does not mean, however, that telephone companies cannot cooperate with their party line subscribers on an *ad hoc* basis subject to local regulatory supervision, or through tariff provisions that set forth the conditions for party line equipment interconnection.[40] Thus, for example, a local tariff condition could permit a telephone company to charge a party line subscriber a reasonable fee to "modify" a terminal device that the subscriber has purchased in the marketplace in order to make the device operational. The subscriber would have access to a range of telephone equipment, connection of which would be subject only to the ability of the local telephone company to achieve technical and operational compatibility with the subscriber's, and others', party line service. Such a condition would not be inconsistent with the policies set forth in *Computer II*. See 84 FCC 2d at 69–70. We believe that New York's concern regarding the pricing of deregulated terminal equipment is encompassed by this approach. We encourage telephone companies and state regulatory commissions to reexamine their current policies and tariff provisions in this regard to accommodate customers seeking to interconnect devices to party lines.

101. We now turn to the recommendations of Purecycle and Monitor that we carve out exceptions to our decision to forebear from party line accommodation. Allowing registration of certain classes of equipment such as non-interactive or specially designed interactive devices would require promulgation of some form of party line rules. Even if such rules were less onerous than those required for an overall party line registration program, we anticipate that there may be successive attempts by innovative manufacturers to extend the boundaries of the permitted categories. This would result in confusion as to the applicability of the rules. In short, we do not believe the kind of exceptions or special rule provisions advocated by Purecycle or Monitor are advisable. We therefore reject both.

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[40] "Neither the *Carterfone* ruling nor these tariffs prevent any State from providing *additional* options to customers with respect to interconnection provided they are alternatives to, rather than substitutes for, the requirements specified in the interstate tariffs, and provided further that such regulations accomplish the protective interference with or impairment of interstate service. . . ." Telerent Leasing Corp., 45 FCC 2d 204 (1974), *aff'd sub nom.* North Carolina Utilities Commission v. FCC, 537 F. 2d 787 (4th Cir., 1976), *cert. denied*, 429 U.S. 1027 (1976).

102. In view of the foregoing, we have decided not to include party line service under Part 68. Direct connection of customer-provided equipment to party line service will remain a matter for resolution by telephone companies and state regulatory commissions, and existing protective device procedures that have been effective since *Carterfone*.

Conclusion

103. We invite parties to comment on the rules we are proposing herein so that one and two-line customer owned premises wiring may be included within the Commission's registration program. Persons taking issue with any of the proposed language should recommend specific alternative language, clearly stating the basis for their objections. We also ask interested parties to comment on our proposals with regard to relaxing the qualification requirements for multi-line wiring currently emboided in Section 68.215(c) of the rules.

Ex Parte Presentations

104. For purposes of this non-restricted informal rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time of issuance of a notice of proposed rulemaking until the time a draft order proposing a substantive disposition of such proceeding is placed on the Commission's Sunshine Agenda. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any written comments previously filed in the proceeding must prepare a written summary of that presentation must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation discussed above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* Section 1.1201 *et seq.* of the Commission's rules, 47 C.F.R. § 1.1201 *et seq.*

Ordering Clauses

105. Accordingly, and in view of the foregoing, IT IS HEREBY ORDERED, pursuant to Sections 1, 4, 201–05 and 403 of the Communications Act of 1934 as amended, 47 U.S.C. §§ 151, 154, 201–05 and 403, and 5 U.S.C. § 553, That a rulemaking proceeding IS HEREBY COM-

MENCED to consider amendments to Part 68 of the FCC's Rules and Regulations, 47 C.F.R. § 68.1 *et seq.*

106. IT IS FURTHER ORDERED that this proceeding IS TERMINATED with regard to the issue of inclusion of party line service under Part 68 of the FCC's Rules and Regulations, 47 C.F.R. §68.1 *et seq.*

107. IT IS FURTHER ORDERED that the Petitions for Rulemaking submitted by the County of Riverside. California and the Deparment of Defense, Defense Communications Agency, ARE GRANTED to the extent hereinbefore disucssed, but otherwise DENIED.

108. IT IS FURTHER ORDERED, that pursuant to 47 U.S.C. §§ 154(i), 154(j), 201–05, 215, 218, 220, 313, 403, 309(e)-(h) and 412, and 5 U.S.C. § 553, NOTICE IS HEREBY GIVEN of proposed rule changes in Part 68 of the Commission's Rules and Regulations, 47 C.F.R. § 68.1 *et seq.*, in accordance with the discussion and delineation of issues herein.

109. IT IS FURTHER ORDERED that the Secretary shall cause a copy of this order to be published in the Federal Register.

110. Interested parties may file comments to the matters contained in this docket on or before January 17, 1983, and reply comments on or before February 11, 1983. In accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, 47 C.F.R. § 1.419, an original and five (5) copies of all comments shall be furnished to the Commission. All submissions field in this proceeding will be available for public inspection during regular business hours in the Commission's Docket Reference Room.[41]

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

Appendix A

It is proposed that Part 68 of the Commission's Rules and Regulations (Chapter 1 of Title 47 of the Code of Federal Regulations, Part 68), as follows:

1. It is proposed to revise Section 68.3(h) to read as follows:

(h) *Interface or Demarcation Point:* The point of interconnection between telephone company communications facilities and equipment, protective apparatus or wiring as a subscriber's premises. The interface or demarcation point shall be located at the subscriber's side of the telephone company's protector, or the equivalent thereof in cases where a protector is not employed, as provided under the local telephone company's (reasonable and nondiscriminatory) standard operating practices. Subsequent relocation of a demarcation point may be arranged, either

[41] For purposes of the Regulatory Flexibility Act, 5 U.S.C. § 603, the FCC certifies that the proposed rule amendments will not have a significant economic impact on a substantial number of small entities. The proposed amendments are for the purposes of developing definitions and completing the applicability of existing rules.

at the subscriber's request or on the serving telephone company's initiative, but the serving telephone company shall not unreasonably discriminate in its treatment of demarcation point location, or relocation.

2. It is proposed to add a new Section 68.213 as follows:

Section 68.213. *Installation of "Unprotected" Premises Wiring for One and Two-Line (Non-System) Residential and Business Telephone Service*

(a) *Scope of this Rule.* Provisions of this rule are limited to "unprotected" premises wiring used with simple installations of wiring for one and two-line residential and business telephone service. More complex installations of wiring for multiple line service. More complex installations of wiring for multiple line services, for use with systems such as PBX and telephone systems, or protected wiring, are controlled by Section 68.215 of these rules.

(b)*Wiring authorized.* "Unprotected" premises wiring (wiring which is not located electrically behind apparatus which protects against hazardous voltages, or against hazardous voltages and imbalance) may be used to connect units of terminal equipment or protective circuitry to one another, and to the interface (or demarcation point), if in accordance with these rules.

NOTE: Based upon comments, final rule provisions in this section may limit installations of customer-owned premises wiring by persons who do not demonstrate competence to perform such wiring, for example to surface wiring alone. *See*, paras. 63–69 of the Second Notice of Proposed Rulemaking.

(c) *Installers' qualifications.*

NOTE: To be determined on the basis of comments. See, paras. 63–69 of the Second Notice of Proposed Rulemaking.

(d) *Workmanship and material requirements.*
[*See*, Section 68.215(d)(1)–(6)]

(7) *Wire Separation.* Minimum separation is required between premises wiring and other conductors or metallic objects, as is specified in Table A below. For wire crossings, alternatives to the minimum separation requirements are shown as a note to Table A. Separations of less than six feet (1.8 meters) and wire on lightning rods are permissible under the following conditions:

(i) Where telephone, power and lightning rod ground connections are all made to a metallic cold water pipe that is properly grounded.

(ii) Where separately driven ground rods are used for telephone, power, and lightning rod installations, and the ground rods are bonded together in accordance with the National Electrical Code.

(iii) In no case shall the separation be less than four inches (102 mm.).

(e) *Notice to the telephone company.* The subscriber shall notify the local telephone company of each operation associated with the installation, connection, reconfiguration and removal of premises wiring at least five days in advance of its connection to the telephone network. The following information shall be provided:

(1) The responsible subscriber's full name, address and telephone number(s).

(2) The date(s) when connection of the wiring to the telephone network will occur.

Table A
Separation and Physical Protection for COPW

This table applies only to COPW that extends from the telephone company-provided network interface or demarcation point jack to telephone equipment. Minimum separations between telephone wiring whether located inside or attached to the outside of buildings, and other types of wiring involved, are as follows. (Separations apply to crossing and to parallel runs.)

	Type of Wire Involved	*Minimum Separations*	*Wire Crossing Alternatives*
Electric Supply	Bare light or power wire of any voltage	5 ft. (1.5 m)	No alternative
	Open wiring not over 300 Volts	2 ft. (.6 m)	See Note 1
	Wire in conduit, or in armored or non-metallic sheath cable, or power ground wires	None	N/A
Radio & Television	Antenna lead-in and ground wire	4 in. (102 mm)	See Note 1
Signal or Control Wires	Open wiring or wires in conduit or cables	None	N/A
Communication Wires	Community television systems coaxial cable with grounding shielding	None	N/A
Telephone Drop Wire	Using fused protector	2 in. (51 mm)	See Note 1
	Using fuseless protector or where no protector is required	None	N/A
Sign	Neon signs and associated wiring from transformer	6 in (152 mm)	No alternative
Lightning System	Lightning rods and wires	6 ft. (1.8 m)	See Wiring Separations

Note 1: If minimum separations cannot be obtained, additional protection of a plastic tube, wire guard, or two layers of vinyl tape extending two inches (51 mm) beyond each side of object being crossed must be provided. No separation is required between telephone wiring and power wires in conduit, armored, or non-metallic sheathed cable.

(3) A statement that all applicable rules, building codes and electrical codes will be complied with.

(4) A brief description of the wiring and other materials used (manufacturer's name, model number or type, etc.) and a general description of the attachment of the wiring to the building structure (for example, run in conduit exclusively devoted to telephone wiring, "fished" through walls, surface wiring, etc.).

(f)*Acceptance testing.* Each installation of one and two-line (non-system) premises wiring in accordance with these rules shall be tested under the acceptance tests specified in this sub-section whenever an operation associated with the installation, connection, reconfiguration or removal of wiring (other than final removal is performed:

(1) *Imbalance testing.* A telephone connected with the line(s) shall be used to perform this test in the following order:

(i) Lift the handset of the telephone to create the off-hook state on the line under test.

(ii) Listen for noise. Confirm that there is neither audible hum nor excessive noise.

(iii) Listen for dial tone. Confirm that dial tone is present.

(iv) Break the dial tone by dialing a digit. Confirm that dial tone is broken as a result of dialing the digit.

(v) With dial tone broken, listent for audible hum or excessive noise. Confirm that there is neither audible hum nor excessive noise.

(2) *"Ringback" testing.* A telephone connected with the line(s) shall be used to perform this test in the following order:

(i) Obtain from the local telephone company information on how to make "ringback" test calls.

(ii) Following the telephone company's instructions, make a "ringback" call and place the telephone on-hook (hang up).

(iii) Permit the telephone to ring for one minute (usually, twelve rings).

(iv) Lift the handset of the telephone to create the off-hook state, for five seconds.

(v) Hang up.

(3) *Failure of accepunce tests.* When an operating telephone is used in these tests, absence of dial tone before dialing, inability to break dial tone, or presence of audible hum or excessive noise (or any combination of these conditions) during either test indicates failure of premises wiring. Failure to receive ringing during the "ringback" testing may indicate failure either of the wiring or of the ringer in the telephone; if necessary, substitute a telephone which is known to be operating to determine which is at fault. Upon any failure, the failing equipment or portion of the premises wiring shall be disconnected from the telephone network, and may not be reconnected until the cause of the failure has been isolated and removed. Any previously tested line(s) shall be retested if it was in any way involved in the isolation and removal of the cause of the failure.

(g) *Extraordinary procedures.*
[*See*, Section 68.215(g).]

(h) *Guidelines for Simple Installations.* Premises wiring should be placed where it will not be broken or detached, and it should be suitably supported by means which do not affect the integrity of the wiring insulation. Wiring which conforms to the following guidelines will be proper; if it is desired to deviate from these guidelines, advice should be sought from the supplier of the wire or the local telephone company to determine whether the wire or proposed installation will be suitable:

(1) The following locations may not be suitable for all forms of telephone wire, because of the characteristics of the insulation of such wire, and should be avoided in simple installation:

(i) Damp locations.

(ii) Wire runs which provide support for other objects.

(iii) Excessively hot locations in proximity to steam pipes, heating ducts, hot water pipes, etc.

(iv) Locations where wires will be subjected to abrasion or corrosion.

(v) Areas above suspended ceiling used for return air plenums (refer to local electrical code provisions which may restrict or limit any wiring in such locations).

(2) Premises wiring should follow structural members such as joists or studs. If it becomes necessary to route wire perpendicular to joists or studs, bored holes through the center or such members are a preferred method of providing support. If it becomes necessary to span the lower edge of joists, run the wire no more than five inches (127 mm.) from a wall to avoid possible damage to the wire.

(3) Whenever conduit (or other ducts) is available or is required by applicable codes for telephone wiring, it may be used solely for telephone wiring (or for non-hazardous voltage sources) and may not contain other electrical wires.

Coverage, Issue,
Diversification, of Control of Mass Media,
Ownership and Management, Integration of
Past Performance, Record of

In hearing matter of mutually exclusive CP applications, Review Board reversed ALJ's grant and awarded it to a competing applicant. The Board found that a substantial preference accorded Red River for diversification outweighed the combined lesser preferences given Community under the best practicable service heading.
—*Communications Properties, Inc.*
BC Docket No. 80–772

FCC 82R–64

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
COMMUNICATIONS PROPERTIES, INC. Fargo, North Dakota	BC DOCKET NO. 80–772 File No. BPH–10,930
RED RIVER BROADCASTING CORPORATION Fargo, North Dakota	BC DOCKET NO. 80–773 File No. BPH–780831AF
For a Construction Permit for a New FM Station	

APPEARANCES

Frederick H. Walton, Jr. and *Christopher J. Reynolds*, on behalf of Communications Properties, Inc.; and *Joseph F. Hennessey, Richard*

C. Rowlenson, and *Mary C. Albert*, on behalf of Red River Broadcasting Corporation.

DECISION

Adopted: November 10, 1982; Released: November 16, 1982

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD:

1. This proceeding was designated to compare two competing applications which both propose to establish a new FM broadcast station in Fargo, North Dakota. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965). The principal question presented is whether the preference of Communications Properties, Inc. (Communications) for best practicable service outweighs Red River's preference for diversification of control of media of mass communications. Based on the specific facts in this case, as highlighted by the Initial Decision and the written and oral arguments, the Review Board has concluded that the overall preference accorded to Communications for best practicable service, one of the Commission's two primary objectives, is less than that accorded Red River under the other objective, diversification. See para. 14, below.

2. *Background.* Following a trial type hearing, Administrative Law Judge Conlin selected Communications over Red River as the best comparative applicant on the basis that the preference awarded Communications for best practicable service, consisting of integration of ownership and management, comparative coverage, past broadcast record and an auxiliary power source, outweighed a diminished diversification preference given Red River. Initial Decision, FCC 82D–40, released May 18, 1982. We have reviewed the record in light of the Initial Decision, the exceptions, replies, and oral argument held September 2, 1982. The Board will adopt the findings of fact in the Initial Decision as slightly modified by this Decision, but we reverse certain of the I.D.'s conclusions for the reasons discussed below.

3. *DIVERSIFICATION OF CONTROL OF THE MEDIA OF MASS COMMUNICATIONS.* When comparing new applicants, one of the primary objectives considered is the maximum diffusion of control of the media of mass communications. *See Policy Statement on Comparative Broadcast Hearings, supra* at 394, 5 RR 2d at 1908. "Other interests in the principal community proposed to be served will normally be of most significance, followed by other interests in the remainder of the proposed service area, and, finally, generally in the United States." *Id.* at 394–95, 5 RR 2d at 1908–09.

4. Red River has no other media interests. Its principal stockholder, F. Gordon Fuqua, has minor interests in two CATV systems located in New Jersey and Florida, which the ALJ correctly found were of little consequence under this criterion. Initial Decision, Conclusions, para 5. On the other hand, Communications is the licensee of Station KFGO located in Fargo, the principal city, and three other AM and two FM broadcast stations. Those other stations are located not closer than 270 miles from Fargo. Besides KFGO, which is owned by Communications, Fargo is presently assigned six AM and FM stations and four television stations. There are 15 stations in the Standard Metropolitan Statistical Area that the ALJ considered in weighing the significance of the diversification criterion. Red River was awarded a diversification preference which was considerably diminished because of the relatively large number of other stations already located in the area. Initial Decision, Conclusions, paras. 6 and 7.

5. In its exceptions Red River contends that it is entitled to a substantial diversification preference, which, on balance overcomes its competitor's preference. Communications, in turn, maintains that Red River is entitled only to a moderate preference (Reply brief at p. 5) and that *Farragut Television Corp.*, 8 FCC 2d 279, 10 RR 2d 50 (1968), requires affirmance of the Initial Decision. We agree with Red River that it is entitled to a substantial preference. *Farragut Television Corp., supra,* where the Commission awarded an applicant for a new UHF television facility with no local media interests only a slight diversification preference over a competing applicant with AM and FM stations in the proposed community of license, is distinguishable from the facts of this case. The slight preference in *Farragut* turned on the fact that there was not a large difference between the applicants insofar as the goal of achieving maximum diffusion of control of mass media was concerned since the applicant receiving the preference had ownership interests in three other UHF television construction permits and the other applicant held five radio licenses and one television license. Here, the contrast between the two applicants' interests is significantly greater: six aural facilities including a local AM station versus no media of any cognizable degree. And of "most significance," in the words of the *Policy Statement,* is the ownership of KFGO in the principal city. While the weight of the diversification preference is diminished by the existence of other media in the Fargo area, Red River is still entitled to a substantial preference because it would provide a new voice in the Fargo area whereas Communications would not. *See Flower City Television Corp.*, 9 FCC 2d 249, 254, 10 RR 2d 1059, 1066 (1967); *Nuance Corp.*, 85 FCC 2d 412, 420–21, 49 RR 2d 147, 154 (Rev. Bd. 1981); *Terre Haute Broadcasting Corp.*, 25 FCC 2d 348, 350–51, 19 RR 2d 487, 491 (Rev. Bd. 1970).

6. *BEST PRACTICABLE SERVICE*. The other primary objective toward which the process of comparison of applicants is directed is the best practicable service to the public. *See Policy Statement, supra*, at 394, 5 RR 2d at 1908. A determination under this criterion involves consideration of several components, including participation of ownership in management, comparative coverage, past broadcast record, and auxiliary power. *See Lorain Community Broadcasting Co.*, 13 FCC 2d 106, 114, 13 RR 2d 382, 392 *recon. denied* 14 FCC 2d 604, 14 RR 2d 155, *rehearing dismissed* 15 FCC 2d 388, 14 RR 2d 968 (1969), *review denied* 18 FCC 2d 686, 16 RR 2d 946 (1969), affirmed sub nom. Allied Broadcasting, Inc. v. *F.C.C.*, 140 U.S. App. D.C. 264, 435 F.2d 68, 19 RR 2d 2071 (1970).

7. *Participation of Ownership in Management.* It is well established that participation of ownership and management is a factor of substantial importance. *See Policy Statement, supra* at 395, 5 RR 2d at 1909. The Commission is primarily interested in full-time participation and to the extent that the time proposed moves away from full time, the credit given will drop sharply. Attributes of participating owners such as local residence and broadcast experience are also considered in weighing the integration proposal. *Id.*

8. Communications is a corporation whose voting stock is owned by two individuals: Philip T. Kelly (61.7%) and Richard C. Voight (38.3%). If its application is granted, Voight, who votes a 50% stock interest in the corporation pursuant to a Shareholder's Agreement, plans to serve as general manager of both the AM and FM stations. He is a local resident, civically active, with more than 20 years of broadcast experience. Red River proposes no cognizable integration of ownership and management. Communications received an integration preference for Voight's involvement at the station, the ALJ finding that Voight proposes only part-time integration. Communications excepts to the failure to credit Voight with full-time integration and argues that, given proper weight, it is entitled to a substantial preference on this factor of comparison, citing *Community Broadcasting Service, Inc.*, 2 FCC 2d 53, 6 RR 2d 589 (1965). Red River, on the other hand, would diminish the credit awarded Communications to very slight, arguing that Voight owns only 38.3% of the stock and would only devote part time to the station.

9. Communications is entitled to a moderate preference for its integration proposal. In reaching this conclusion, we have initially credited Communications with 50% quantitative integration since that percentage reflects the extent of legal authority and voting power Voight exclusively possesses to implement station policy decisions. *See Cleveland Television Corp.*, 52 RR 2d 581, 584–591 (Rev. Bd. 1982) and cases cited therein. Red River's reliance on *Berryville Broadcasting Co.*, 70 FCC 2d 1, 44 RR 2d 1325 (Rev. Bd. 1978), does not require a contrary result. In *Berryville*, the Board was concerned whether two individuals were in fact "true and

actual owners" for integration purposes. The case is inapplicable here since true ownership is not in dispute. We also agree with Communications that Voight should be credited with full-time rather than part—time participation at the station. The Board has consistently declined to reduce proposed "full-time" participation to "part-time" where an integrated principal intends to divide his time between consolidated AM and FM stations since the principal will be in close supervision of station affairs on a daily basis. *See Gilbert Group, Inc.*, 88 FCC 2d 401, 406, 50 RR 2d 87, 92 (Rev. Bd. 1981); *KALT-FM, Inc.*, 49 FCC 2d 61, 64, 31 RR 2d 765, 770 (Rev. Bd. 1974); *WVOC, Inc.*, 45 FCC 2d 420, 423, 29 RR 2d 893–898 (Rev. Bd. 1974). Some diminution of the integrated credit is nonetheless warranted on the basis of the division of effort between the stations. *Id.* Our conclusion to award Communications a moderate preference has taken into account *Community Broadcasting*, a 1965 Board case, where a substantial integration preference was awarded on similar facts. Since that case was decided, the Board has indicated on numerous occasions that maximum credit is not appropriate where less than a majority of stock ownership is fully integrated. *See Gilbert Group, Inc., supra; Nuance Corp., supra; Pleasant Broadcasting Co.*, 40 FCC 2d 582, 27 RR 2d 257 (Rev. Bd. 1973); *Lorain Community Broadcasting Co., supra.* Communications' integration proposal is superior to that of Red River. But its preference has been diminished to moderate because of Voight's division of time between the two stations, and Communications' failure to integrate a majority of its stock ownership on a full-time basis.

10. *Comparative Coverage.* The applicants' proposed service areas (1 mV/m contours) vary slightly since the applicants propose to operate from different sites with different antenna heights. A preference was awarded to Communications because it would provide a second nighttime service to 4,456 people residing in an area of 588 square miles not covered by Red River, see *Town and Country Radio, Inc.*, 70 FCC 2d 572, 575, 44 RR 2d 149, 153 (Rev. Bd. 1978). In its exceptions, Red River contends that there should be only a very slight preference, citing *CJL Broadcasting, Inc.*, 88 FCC 2d 750, 50 RR 1159 (Rev. Bd. 1982). We disagree. In *CJL Broadcasting*, where a slight preference was given, the applicant did not propose to provide either a "first" or "second" primary aural service; and as noted in that case, such service is a factor of considerable importance. In contrast, Communications would provide a "second" service to a relatively significant gray area, i.e., 4,456 population, and is therefore entitled to a moderate preference. *See Town and Country Radio, Inc., supra*, where a moderate preference was given an applicant who would provide a second service at night to 5,341 more persons than the other applicant.

11. *Past Broadcast Record.* Communications seeks comparative credit for the past broadcast record of Station KFGO in Fargo since September

15, 1978, when it acquired that station. An applicant's past broadcast record is a factor of importance in the comparative process but will be considered only when the record is either unusually good or unusually poor, since such a record could give some indication of unusual performance in the future. *See Policy Statement, supra* at 398, 5 RR 2d 1912. The ALJ found that past operation of Station KFGO had been unusually good and that the proposed facility would be headed by the same individual who managed KFGO, Mr. Voight. Communications was therefore awarded a preference for the record compiled by Station KFGO. Red River challenges this preference, contending that Station KFGO's past broadcast record was all compiled after Communications' present FM application was filed and the applicant failed to adduce evidence as to the past broadcast record of its other stations.

12. The ALJ correctly found that KFGO's broadcast operation has been unusually attentive to Fargo's needs and interests. The failure of Communications to adduce evidence regarding its other stations is not significant here since the individual who was an owner and general manager of Station KFGO during the period in question and responsible for much of its operation proposes to be significantly integrated in the operation of this station as its general manager. *See Flower City Television Corp., supra* at 255, 10 RR 2d at 1068; *cf. Farragut Television Corp., supra,* where the Commission concluded that an applicant had a superior past broadcast record without considering four stations owned elsewhere by the applicant. This preference must be substantially reduced, however, since Communications has known from the time it initially acquired Station KFGO that it was facing a comparative hearing with Red River's application. *See Terre Haute Broadcasting Corp., supra* at 352, 19 RR 2d at 492; and *Chapman Radio and Television Co.*, 19 FCC 2d 157, 173, 17 RR 2d 60, 80 (Rev. Bd. 1969); *cf. Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 712–13, 51 RR 2d 389, 396 (Rev. Bd. 1982). Communications is therefore entitled to a slight preference for its past broadcast period.

13. *Auxiliary Power.* Communications proposes to install an auxiliary source of power and is entitled to a very slight preference on this factor. *See Addendum to Policy Statement on Comparative Broadcast Hearings*, 2 FCC 2d 667 (1966).

14. *Summation.* Red River has received a substantial diversification preference. Under the best practicable service factor, Communications has received moderate integration and comparative coverage preferences, a slight past broadcast record preference, and a very slight auxiliary power preference. Although the choice is close, weighing these preferences, the scale tips in favor of Red River because it received a substantial preference on one of the primary comparative objectives. *Cf. Henderson Broadcasting Co., Inc.*, 63 FCC 2d 419 (Rev. Bd. 1977); *Resort Broadcasting Co., Inc.*, 41 FCC 2d 640, 647, 27 RR 2d 1379, 1388 (Rev.

Bd. 1973). While Communications has been awarded a larger number of preferences, none of them is substantial, and their combined weight under the best practicable service heading does not equal the substantial preference accorded Red River for diversification. In our view, the fact that Red River will bring a new voice to Fargo is more significant than any of the lesser individual or combined advantages of Communications. *See Nuance Corp., supra; Associated Press* v. *U.S.*, 326 U.S. 1 (1945). Accordingly, we believe that a grant of Red River's application would better serve the public interest, convenience and necessity.

15. ACCORDINGLY, IT IS ORDERED, That the motions to correct transcript of oral argument filed on September 15, 1982 by Red River Broadcasting Corporation and Communications Properties, Inc., respectively, ARE GRANTED; and

16. IT IS FURTHER ORDERED, That the application of Red River Broadcasting Corporation (File No. BPH–780831AF) for a construction permit to establish a new FM broadcast station at Fargo, North Dakota, IS GRANTED, and the application of Communications Properties, Inc. (File No. BPH–10,930), IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino *Chairman, Review Board*

FCC 82D-40

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
COMMUNICATIONS PROPERTIES, INC. Fargo, North Dakota	BC DOCKET NO. 80-772 File No. BPH-10,930
RED RIVER BROADCASTING CORPORATION Fargo, North Dakota	BC DOCKET NO. 80-773 File No. BPH-780831AF
For a Construction Permit for a New FM Station	

APPEARANCES

Frederick H. Walton, Jr. and *Christopher J. Reynolds,* on behalf of Communications Properties, Inc.; *Richard C. Rowlenson,* on behalf of Red River Broadcasting Corporation; and *Joseph A. Belisle,* on behalf of the Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN H. CONLIN

Issued May 13, 1982; Released May 18, 1982

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Communications Properties, Inc. (CPI) and Red River Broadcasting Corporation (Red River) for a construction permit for a new FM broadcast station on Channel 270C, Fargo, North Dakota. The applications were designated for hearing on the following issues:

1. To determine the efforts made by Communications Properties, Inc. to ascertain the community needs and problems of the area to

be served and the means by which the applicant proposed to meet those needs and problems.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which, if either, of the applications should be granted.

In an order (FCC 81M-715) released March 11, 1981, the presiding officer deleted the ascertainment issue. A prehearing conference was held on March 6, 1981 and hearing sessions were conducted on May 19 and 20. The record was closed by order on July 7. Proposed findings and conclusions were filed by all parties on July 20, 1981; reply findings and conclusions were filed by the applicants on August 7.

Findings of Fact

The Community.

2. Fargo, the county seat of Cass County, is the largest city in North Dakota and is the principal city of the Fargo, North Dakota-Moorhead, Minnesota SMSA. Fargo has a 1980 U.S. Census population of 61,308 persons (a 14.9% increase from 1970) with 134,574 persons living in the SMSA. It is a major agricultural trade center with some 3,500 farms within a 50-mile radius. It is also a major commercial and transportation center.

The Applicants.

3. Red River is a corporation created under the laws of the state of North Dakota and is authorized to do business in that state. The corporation was formed specifically for the purpose of applying for an FM station at Fargo. Red River is comprised of the following stockholders and officers:

Name	*Nature of Interest/ Office*	*% of Ownership of Voting Stock Including All Issued and Subscribed Shares*
F. Gordon Fuqua	President, Treasurer and Director	97%
Herbert R. Hunt	Vice President, Secretary and Director	3%
Mary C. Albert	Director	0%

4. CPI is a Minnesota corporation (formerly KVZ, Inc.) which on September 15, 1978 acquired ownership and control of KFGO(AM),

Fargo, North Dakota, as well as stations located in Albert Lea, Minnesota, Dubuque, Iowa and Green Bay, Wisconsin. CPI's officers and directors are:

Name	*Office*
Philip T. Kelly	President, Treasurer and Director
Richard C. Voight	Vice President and Director
Harold M. Gellman	Director
M. D. Price, Jr.	Secretary

5. Capitalization of CPI consists of 37,850 shares of Class A voting and 37,850 shares of Class B nonvoting common stock. Messrs. Kelly and Voight are the sole holders of Class A voting stock and pursuant to a Shareholders Agreement each votes 50% of the Class A voting stock, of which 23,358.5 shares (61.7%) is owned by Kelly and 14,491.5 shares (38.3%) is owned by Voight. They own, respectively, 19,553.5 and 12,646.5 shares of the Class B nonvoting stock with the remainder owned by members of their immediate families, except for 750 shares owned by Loras Sabers, employee-manager of CPI's Dubuque stations and 500 shares owned by Dennis Martin, employee-manager of CPI's Albert Lea stations.[1]

Media Interests of the Applicants.

6. *Red River.* Red River has no ownership interests in broadcast properties or other media of mass communications. Its majority stockholder, F. Gordon Fuqua, owns 2.5% of Cable One, a cable television company serving Trenton and Ewing, New Jersey, and less than 5% of the stock of AREA Communications, Inc., a cable television company in Jacksonville, Florida. Fuqua is a director of AREA and was formerly an officer. His role in Cable One is solely that of a stockholder. In addition, he is a 5% (approximately) stockholder in Fairfax Telecommunications Corporation, which planned to file an application for a cable television franchise in Fairfax County, Virginia. He is also an officer of the company.

7. *CPI.* CPI is the licensee of the following broadcast stations: KFGO, Fargo, 790 kHz, 5kW power, unlimited hours, DA-night; KATE, Albert Lea, Minnesota, 1450 kHz, 1 kW day, 250 W night, unlimited hours; WDBQ, Dubuque, Iowa, 1490 kHz, 1 kW day, 250 W night, unlimited hours; WNFL, Green Bay, Wisconsin, 1440 kHz, 5 kW day, 500 W night, different DA day and night, unlimited hours; KCPI-FM, Albert Lea,

[1] Several nonmaterial changes in the above information have been reported in amendments filed during the course of the proceeding.

Minnesota, 95.3 MHz, 3 kW power, 300 ft. effective height, unlimited hours; and KIWI-FM, Dubuque, Iowa, 105.3 MHz, 50 kW power, 330 ft. effective height, unlimited hours.[2] Neither CPI nor any of its officers, directors, stockholders or members of their immediate families have any ownership interests or official positions in any other medium of mass communications.

8. Other stations in the Fargo-Moorhead area[3] include the following:

Midwest Radio Company	KQWB-AM, Fargo, 1550 kHz (CP 10 kW day) 5 kW unlimited hours, DA-N.
	KQWB-FM, Moorhead, 98.7 MHz 100 kW, 460 ft. effective height (CP 581 ft. effective height).
Forum Communications	WDAY-AM, Fargo, 970 kHz, 5 kW unlimited hours, DA-N.
	WDAY-FM, Fargo, 93.7 MHz, 100 kW, effective height 1030 ft.
Northwestern College	KFNW-AM, Fargo, 1170 kHz, 10 kW unlimited hours.
	KFNW-FM, Fargo, 97.9 MHz, 100 kW, effective height 350 ft.
Forward Communications Corporation	KVOX-AM, Moorhead, 1280 kHz, 5 kW day, 1 kW night, unlimited hours, different DA day and night.
	KVOX-FM, Moorhead, 99.9 MHz, 100 kW, 393 ft. effective height.
ND State University	KDSU-FM, Fargo, 91.9 MHz, 1.2 kW, effective height 110 ft. (CP 100 kW; 992 ft. effective height).

[2] Albert Lea is about 270 miles from Fargo; Dubuque and Green Bay are well over 400.

[3] Stations assigned to Moorhead, Minnesota have been included since Fargo and Moorhead are separated only by the Red River and are part of the same SMSA.

Concordia College	KCCM-FM, Moorhead, 91.1 MHz, 100 kW, 641 ft. effective height.

Television

North American Communications Corp.	Fargo, CH 4, 97.7 kW vis. power, 2030 ft. effective height.
Forum Communications	WDAY-TV, Fargo, CH 6, 100 kW vi. power, 1150 ft. effective height.
Spokane TV, Inc.	KTHI-TV, Fargo, CH 11, 304 kW vis. power, 2000 ft. effective height.
Prairie Public TV, Inc.	KFME, Fargo, CH 13, 264 kW vis. power, 390 ft. effective height (CP 309 kW, 1130 ft. effective height).

In addition, Fargo has a daily newspaper, and the immediate area has three cable systems serving about 14,500 subscribers.

Integration of Ownership with Management.

9. *Red River.* F. Gordon Fuqua, Red River's majority stockholder (97%), will, according to the applicant's proposal, "be solely responsible for decision-making activities affecting day-to-day programming, and station operation through Red River's appointed and supervised General Manager" (Red River Ex. 3, p. 1). He would, however, be required to exercise these responsibilities from a distance of about 1,400 miles since he resides in Jacksonville, Florida and does not intend to move to Fargo, a community he visited once, following the filing of his application (Tr. 241).[4] To overcome this difficulty Fuqua intends to "maintain daily telephone contact" with the station's general manager and to travel to Fargo "as required" (Red River Ex. 3, p. 1). No role in the day-to-day operation of the station is proposed for Red River's only other stockholder.[5]

10. *CPI.* Richard C. Voight, who will vote 50% of the stock,[6] will serve as general manager of the proposed station, a position he now holds at

[4] Fuqua selected Fargo after being advised by his communications counsel that it was one of several communities with available FM channels (Tr. 256–257).

[5] Red River has proposed extensive findings on Fuqua's background and experience in the cable television industry. Since it is evident that he will not be integrated in a meaningful way into the day-to-day operation of the proposed station, this information is deemed immaterial.

[6] His actual ownership interest is somewhat less. See para. 5, *supra*.

CPI's AM station in Fargo, KFGO. He expects to devote most of his time to the FM station until it is established and thereafter will spend at least 50% of his time on its affairs (Tr. 154–155). He began his career in broadcasting in 1958, serving in various capacities at stations in Wisconsin and Minnesota. In 1973 he became general manager of CPI's existing station in Fargo and has lived in the community since that time. He is a member of the local Kiwanis Club and Chamber of Commerce and has been regularly involved in activities (largely fund raising) of the United Way, YMCA and Concordia College. In addition to being general manager of KFGO, he is an officer and director of CPI. No other principal will be actively involved in the day-to-day management of the proposed station.

Efficient Use of Frequency.

11. CPI and Red River each seeks a permit to construct a Class C FM broadcast station which would operate on Channel 270 (101.9 MHz) with an effective radiated powr of 100 kW. Each proposes to operate from a different site, and CPI's antenna height above average terrain (center of radiation) is 629 feet while Red River's is 1,010 feet.

12. Comparison of the technical proposals of the applicants shows the following:

	CPI	*Red River*
Total area within proposed 1 mV/m contour	4,632 sq. mi.	4,643 sq. mi.
Total population within proposed 1 mV/m contour	136,070	134,044

CPI will serve 21,289 persons in an area of 1,933 square miles that will not be served by the Red River proposal; Red River, in turn, will serve 17,241 persons in an area of 2,010 square miles that will not be served by CPI. The difference in favor of CPI of 4,048 more persons represents approximately 3% of the total population to be served. All part of uncommon areas receive at least four primary aural services during daytime hours.

13. During nighttime hours, the following areas and populations outside the common area would receive second, third and fourth primary aural services (populations based on 1970 U.S. Census):

	CPI	*Red River*
Second Aural		
Area in sq. mi.	588	0
Population	4,456	0
Third Aural		
Area in sq. mi.	836	493
Population	3,397	3,383

Fourth Aural		
Area in sq. mi.	321	601
Population	906	1,202

Auxiliary Power Supply

14. In the construction and installation of the proposed new Fargo FM station, CPI has made provision for a standby electrical generator to supply electric power to the station in the event of any failure of regular power sources. No such proposal is made by Red River.

KFGO Past Broadcast Record.

15. CPI submitted extensive material in support of its claim of an unusually good past broadcast record for KFGO in Fargo since 1978.[7] Its evidence consisted of data on the two composite weeks issued by the FCC covering dates in the period following September 15, 1978; tabulations of public service announcements broadcast; descriptions of KFGO nonentertainment programming; and audience ratings, awards and other recognitions of KFGO's service to the public.

16. *Composite Week Data.* KFGO's composite week performance as extracted from its most recent December 1, 1979 renewal application showed that it broadcast a total of 2,075 minutes of nonentertainment programming (excluding commercial matter) or 20.6% of its weekly hours as a 24-hour station. In the same week it broadcast 272 local PSA's. This was compared with the comparable data extracted from the concurrently filed renewal applications of the three other AM and three other FM commercial stations located in Fargo and Moorhead. One Fargo AM station, with a format it described as 20% talk, broadcast 3,399 minutes of nonentertainment programming or 33.7% of its weekly time, and aired 121 PSA's. Of the remaining five stations, total nonentertainment ranged from a high of 11.8% to a low of 7.9% with PSA's ranging from 368 to 147.

17. In the following year KFGO time devoted to total nonentertainment programming was 2,549.1 minutes (excluding commercial matter) or 25.5% of total weekly hours with 350 local PSA's broadcast. The record contained a listing of some 40 different programs and program series included by KFGO in each of these two composite weeks which addressed local, regional and national issues.

18. *Public Service Announcements.* KFGO broadcast 4,729 PSA's for a variety of local organizations and agencies in the period 10/79 to 2/81 not including a minimum of four PSA's broadcast in community calendar segments throughout the day. In a March-April 1981 four-week period, KFGO broadcast 2,435 PSA's including some 2,019 PSA's broadcast in the

[7] CPI, as presently constituted, did not acquire ownership of that station until September 15, 1978.

community billboard segments. The weekly average for local PSA's in this period was 609.

19. *KFGO Nonentertainment Programming: News.* KFGO has maintained a schedule of news broadcasts with 5 minutes of local news on the half hour (147 minutes daily) and 4½ minutes of CBS news on the hour, every hour, 24 hours per day. KFGO has served and continues to serve as UPI's news service bureau for all of North Dakota and maintains reciprocal news trade agreements with three other North Dakota stations outside Fargo. KFGO has operated and still operates with a full-time news staff of five.

20. KFGO's news operation included intensive weather coverage for which KFGO has been given awards as described, *infra.* In addition to weather coverage in the regular hourly local news, there are two daily special weather reports as part of KFGO's service to the farm community and emergency broadcasts when conditions warrant them. In addition to its access to standard sources of weather information, KFGO developed a network of 50 or more road and weather observers at truck stops, restaurants and similar places. This network includes KFGO access to the North Dakota State Highway Department's weigh scale stations, which are also part of the department's own weather information network.

21. *Public Affairs.* KFGO has broadcast a variety of programs and series responsive to community needs and problems as well as community service and promotional activities. Examples of these were a series of four programs on drug problems in high schools four to five minutes in length. Another week-long series was broadcast in connection with a local campaign to train residents in CPR (cardio pulmonary resuscitation). A series of nine programs, each 50 minutes in length, was broadcast in support of the local Coordinated Arts Fund Campaign during the period September 24–28, 1979. With the average 27-minute PA segment of the *W. Tom Simmons Show,* KFGO broadcast two phone-in programs on energy; a 60-minute discussion on programs for the handicapped; three programs on a Proposition 8 referendum issue; a series on family and local heritage; regular length programs on alcoholism; women returning to the work force; public safety; dental health; and a 14-program regular length series with the Cass County Home Economist on consumer and home guidance.

22. A series of political and election programs were also broadcast during the fall of 1978: 60 minutes of a University of North Dakota Election Issue Forum; candidates for Attorney General (30 minutes); state representatives' political debate (15½ minutes); candidates for county commissioner (21.35 minutes); and candidates for county sheriff (28 minutes).

23. A further element of KFGO's public affairs programming effort has been its practice for the past two years of incorporating in many of its

news broadcasts a short 30 to 70-second public affairs element on a community problem as a follow-up or as investigative reporting of an earlier news report or activity. A file of these public affairs elements has been maintained throughout the two-year period.[8]

24. *Agriculture.* KFGO serves one of the richest agricultural areas in the country and has emphasized programming directed to the needs and interests of those engaged in farming and related activities. KFGO broadcasts a schedule of 22 agricultural programs of farm news, markets and weather beginning at 6:06 a.m. and ending at 5:59 p.m. This amounts in the aggregate to 1 hour and 16 minutes daily of such programming for the farm community. This is supplemented on Saturday mornings with 28 additional minutes of seven agricultural programs, and on a daily basis by the weather broadcasts described above. In this connection KFGO is the only station in Fargo-Moorhead with a live hookup with the National Weather Service with local broadcasts at 7:50 and 11:52 a.m. as well as additional broadcasts during tornado and severe weather conditions.

25. *KFGO's Awards, Audience Ratings and Other Recognition.* In the past four years, KFGO radio news has won 15 local, state, regional and national awards and citations. KFGO's work in weather broadcasting was recognized by a special service award it received from the U.S. Department of Commerce (National Weather Service) for pioneering "NOAA" weather warning system broadcast stations and for general excellence in weather information broadcasting.

26. In 1979 KFGO was honored in three separate categories by the North Dakota Associated Press Broadcasters. These were (1) a "national award" for outstanding coverage of a flood in the Red River Valley; (2) a decade award—honoring KFGO for a decade of news excellence; and (3) best spot news award—honoring KFGO for top overall coverage of on-the-spot news events. In that same year the Northwest Broadcast News Association recognized KFGO for its small market spot news by awarding it first place in a six-state competition for its coverage of the 1979 Red River flood. In the following year, KFGO again received that award for its coverage of the tornado strike at Colfax, North Dakota. That same association also bestowed on KFGO its first place editorial award for small market stations in a six-state area for KFGO's editorial on the Iranian hostage crisis. Another best editorial award in a Minnesota state competition was given to KFGO by the Minnesota United Press International Broadcasters Association. KFGO received two other awards in 1980 from the North Dakota Associated Press Broadcasters Association for best radio feature and best radio newscast.

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[8] The above description of KFGO's public affairs programming is merely a selective summary of material set forth in CPI Ex. 4F.

Conclusions

Best Practical Service to the Public.

1. *Integration of Ownership with Management.* Red River proposes no cognizable integration of ownership with management. F. Gordon Fuqua's proposals to be in daily contact with the station by telephone and to visit Fargo if and when circumstances require his presence[9] are essentially meaningless in the context of ownership integration. See *Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C. 2d 393, 395 (1965); *Midwest Broadcasting Company,* 70 F.C.C. 2d 1489, 1494–1495 (Rev. Bd. 1979), *affirmed* by *Order* (FCC 79-397) released June 22, 1979. CPI's Richard Voight, who votes a 50% stock interest in the corporation, will devote at least 50% of his time to the station, serving in the position of general manager. Voight is a local resident with more than 20 years of experience in broadcasting, 8 of them at KFGO in Fargo. Though Voight's involvement amounts to less than full-time participation, the extent of his ownership interest and the key managerial position he will occupy, enhanced as they are by his local residence and experience, justify a preference for CPI in this area of comparison.[10]

2. *Past Broadcast Record.* CPI has presented considerable evidence in support of its claim that its operation of KFGO has been uncommonly good. The *Policy Statement* makes clear that only "unusual attention to the public's needs and interests" justifies a preference in this area. It is concluded that the evidence presented in this proceeding meets that test. KFGO's nonentertainment programming is substantially greater than all but one of the other commercial stations in the Fargo-Moorhead area. Its coverage of weather and agricultural information, matters of particular importance in this agricultural area, has been intensive, and its sizeable news staff has repeatedly gained special recognition for the station through its news coverage and editorials. In addition, KFGO's public affairs and other community service programming has addressed itself to a variety of community needs and problems, as well as those of regional and national interest. These considerations and others detailed in the findings show that CPI's operation of KFGO has been out of the ordinary and indicate that the station it has applied for here, which will be headed by the same individual who managed KFGO, would also be highly respon-

[9] As stated in the findings, Fuqua resides in Florida.

[10] In reaching this result account has been taken of the general rule that integration credit "will drop sharply" where less than full-time participation is proposed. *Policy Statement, supra.* In comparative terms, however, there is a significant difference between the part-time integration of a substantial stockholder who is a local resident with considerable broadcast experience in the community, and the absence of integration in the proposal of the competing applicant.

sive to the area's needs and interests. Accordingly, CPI is granted a preference for the record compiled by KFGO. See *Farragut Television Corp.*, 8 F.C.C. 2d 279, 283–284 (1967).

3. *Comparative Coverage.* As the findings show, there is little difference in the square miles or populations served by the respective proposals, though CPI has a slight advantage in that the number of people who would receive its signal is slightly greater. More importantly, CPI would provide a second nighttime service to nearly 4,500 people, while all of the people to be served by Red River receive at least two services at night.[11] In the circumstances CPI will be accorded a preference for its more efficient use of the frequency. See *Town and Country Radio, Inc.*, 70 F.C.C. 2d 572, 575 (Rev. Bd. 1978).

4. *Auxiliary Power.* CPI's proposal to install an auxiliary source of power warrants a slight preference since Red River proposes no such alternative. See *New Continental Broadcasting Co.*, 80 F.C.C. 2d 830, 851 (Rev. Bd. 1981).

Diversification of Ownership of Mass Media.

5. Red River's Fuqua has minor ownership interests in two CATV systems located in Florida and New Jersey. These are plainly of little consequence to this proceeding. CPI, on the other hand, owns an AM station in Fargo (KFGO), another in Green Bay, Wisconsin, and AM-FM facilities in Dubuque, Iowa and Albert Lea, Minnesota. With the exception of the Fargo AM station, all are in other states and are located some distance from Fargo. Nonetheless it is evident that Red River is entitled to a preference in this area of comparison.

6. The magnitude of the preference is disputed by the applicants, Red River contending that it is controlling and CPI arguing that it is outweighed by other factors. Most significant is CPI's ownership of KFGO in Fargo, with less weight being given its ownership interests in other distant stations. *Policy Statement, supra,* at 394. However, the record shows that in Fargo (population 61,308), there are presently assigned six aural broadcast stations (in addition to KFGO) and four television stations. If one includes the neighboring city of Moorhead, the total number of broadcast facilities now located in the area (again in addition to KFGO) is 14—10 aural and 4 television. By either standard, 11 stations in a city of 61,308 or 15 stations in the SMSA (population 134,574), there is an abundance of broadcast service. Several of these stations are commonly owned, but overall 10 different licensees are identified in the findings as being authorized to operate in Fargo-Moorhead and 8 in Fargo alone. Since Red River would bring a new "voice" to the community and has no

[11] The difference between the applicants in terms of providing a third nighttime service is negligible.

significant media interests elsewhere, a preference is warranted; but its strength is necessarily diminished because of the relatively large number of stations already located in the community the applicants propose to serve. See *Policy Statement, supra,* at 395; *Farragut Television Corp., supra,* at 281.

Summation.

7. Red River has received a preference for diversification in view of CPI's media interests in Fargo and elsewhere. This factor assumes considerably less significance than would ordinarily be the case in view of the unusually large number of broadcast services (for a community of Fargo's size) already located in the area. CPI has been preferred in four areas which are considered indicative of an ability to better serve the public needs and interests of the community: ownership integration, superior coverage, broadcast record, and an auxiliary power source. None of these preferences is considerd to be decisive in itself but together they give CPI a clear-cut advantage in terms of providing "the best practicable service to the public." Since the facility at issue in this case would be the 12th broadcast station assigned to Fargo and the 16th in Fargo-Moorhead, it is concluded that quality of service is a more significant consideration than the need for an additional independent voice in the community. The public interest would therefore be better served by granting the application of CPI.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Communications Properties, Inc. IS GRANTED and the application of Red River Broadcasting Corporation IS DENIED.[12]

FEDERAL COMMUNICATIONS COMMISSION

John H. Conlin, *Administrative Law Judge*

[12] In the event exceptions are not filed *within 30 days after the release of this Initial Decision,* and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Satellite Direct Broadcast

Certain applications for authority to establish interim direct b/c satellite (DBS) systems granted. Request of carrier for modification of existing authority (86 FCC 2d 196) deferred.
—*DBS Systems*

FCC 82–498

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Applications of	File Nos.
CBS, INC.	DBS–81–02
DIRECT BROADCASTING SATELLITE CORPORATION	DBS–81–03
FOCUS BROADCAST SATELLITE COMPANY	DBS–81–04
GRAPHIC SCANNING CORPORATION	DBS–81–05
RCA AMERICAN COMMUNICATIONS, INC.	DBS–81–06
UNITED STATES SATELLITE BROADCASTING COMPANY, INC.	DBS–81–07
VIDEO SATELLITE SYSTEMS, INC.	DBS–81–08
WESTERN UNION TELEGRAPH COMPANY	DBS–81–09
for authority to establish interim Direct Broadcast Satellite Systems	File No. W–P–C–1752
and	
Request of	
WESTERN UNION TELEGRAPH COMPANY	
for modification of existing authority to lease transmission capacity on the Advanced Westar satellite system in order to provide interim DBS service pending establishment of its own DBS system	

MEMORANDUM OPINION AND ORDER

Adopted: November 4, 1982; Released: December 3, 1982

BY THE COMMISSION: COMMISSIONER JONES DISSENTING AND ISSUING A STATEMENT; COMMISSION DAWSON CONCURRING AND ISSUING A STATEMENT; COMMISSIONER RIVERA ABSENT.

I. Introduction

1. The Commission has before it applications for authority to establish interim direct broadcast satellite (DBS) systems[1] filed by CBS, Inc. ("CBS"), Direct Broadcast Satellite Corporation ("DBSC"), Focus Broadcast Satellite Company ("Focus"), Graphic Scanning Corporation ("Graphic"), RCA American Communications, Inc. ("RCA"), United States Satellite Broadcasting Company, Inc. ("USSB"), Video Satellite Systems, Inc. ("VideoSat"), and Western Union Telegraph Company ("Western Union"). In addition, the Commission has received a request from Western Union for modification of its authority to lease transmission capacity on the Advanced Westar Satellite System in order to provide interim DBS services pending the establishment of its own DBS system.

2. The Commission also has before it various petitions to deny, comments, and responsive pleadings[2] pertaining to these applications.[3] Petitions to deny and/or responsive pleadings were filed by Aerospace and Flight Test Radio Coordinating Council ("Aerospace"), American Broadcasting Companies, Inc. ("ABC"), Association of American Railroads ("Railroads"), Association of Maximum Service Telecasters, Inc. ("MST"), the Chairperson for the Hispanic Bar Association ("Hispanic Bar"), the County of Los Angeles, California ("Los Angeles"), Farinon Electric Operations/Harris Corporation ("Farinon/Harris"), Joint Reply of Forward Communications Corporation, *et al.*, ("Licensees"), joint Comments of Media Access Project, International Union, and United Auto Workers ("Media Access"), Manufacturers Radio Frequency Advisory Committee ("Manufacturers"), the National Association of Broad-

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[1] Direct broadcast satellite (DBS) service is a radiocommunication service by which signals from earth are retransmitted by high power, geostationary satellites for direct reception by small, inexpensive earth terminals. Generally, we use the term DBS when discussing domestic policy matters and the term broadcasting satellite service (BSS) with regard to international frequency allocation matters, in particular, the Table of Frequency Allocations. In many instances, DBS and BSS are used interchangeably herein.

[2] Unless specifically indicated otherwise, we shall use the term "petitioners" to refer to parties filing petitions to deny, comments, or other responsive pleadings and the term "petitions" to refer to petitions to deny, comments, or other responsive pleadings.

[3] We are not addressing herein matters that have arisen subsequent to the deadlines for filings petitions, comments, and other pleadings related to these applications. Where appropriate, such matters will be addressed when applications for operational authority subsequent to RARC–83 are considered. Also, we note at the outset that many of the petitioners' objections to these applications amount to challenges to policy matters addressed and resolved in the DBS rule making proceeding, Gen. Docket 80–603. These objections were or should have been filed in that docket. Although all objections to the subject applications are considered herein, this *Order* refers to the DBS *Report and Order* as the primary basis for responding to such general policy objections.

casters ("NAB"), Joint Comments of National Citizens Committee for Broadcasting and Citizens Communications Center ("NCCB"), Oak Communications, Inc. ("Oak"), Raytheon Data Systems Co. ("Raytheon"),[4] Satellite Business Systems ("SBS"), Satellite Development Trust ("SDT"), Satellite Syndicated Systems, Inc. ("Syndicated"), Southern Pacific Communications Company ("SPCC"), the Television Network Affiliates Association ("Affiliates"), Utilities Telecommunications Council ("Utilities"), and Western Communications Research Institute, Inc. ("Western Research"). Petitions to deny, comments and responsive pleadings were also filed by Satellite Television Corporation ("STC") and some of the above-captioned DBS applicants.[5]

3. For the reasons discussed, *infra*, we are granting construction permits for new DBS systems to all the applicants, with the exception of Focus.[6] Accordingly, we are denying the various petitions relating to these applications. We have concluded that because the Focus application does not constitute a request to construct and operate a DBS system but instead represents a request to utilize transmission capacity of a satellite common carrier, the application is unnecessary. In this regard the Commission decided in the DBS *Report and Order* that no license would be necessary for programmer-customers of common carrier DBS operators. See *Report and Order*, at paragraphs 87–90. In addition, while we are acting upon the request of Western Union regarding a construction permit for a DBS system, we are today referring to the Common Carrier Bureau that portion of Western Union's application that proposes modi-

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[4] Raytheon's petition to deny was filed on December 21, 1981, seven days after the December 14, 1981, due date for filing such petitions. However, in the interest of ensuring a full and fair consideration of the issues relating to these pending DBS applications, we have decided to accept Raytheon's petition, and any other documents that may have been filed late, as informal comments.

[5] In addition, National Christian Network, Inc. ("NCN") filed a motion for stay of the processing of DBS applications. Similarly, DBSC, Aerospace and NAB filed requests for specific actions relating to the processing of these applications. DBSC requested that all the applications in the first cut-off list be processed in an expedited manner and that the Commission consider all construction permits for first round applicants at the same time. Aerospace requested that the Commission defer action on the DBS applications or designate them for hearing. NAB requested that we seek expedited judicial review of our recent DBS *Report and Order*, 90 F.C.C. 2d 676 (1982), *pet. for review filed, NAB* v. *FCC and USA*, Case No. 82–1926 (D.C. Cir., August 11, 1982), and defer grants to any DBS applications or their effective dates pending judicial resolution of the *Report and Order*. Requests of this nature, relating to the processing of these applications, were fully considered in paras. 103–104 of *Satellite Television Corporation (STC Interim Grant)*, FCC 82–427, 91 F.C.C. 2d 953, released October 13, 1982, and denied for the reasons stated therein. These matters will not be considered herein.

[6] These grants are conditioned upon the outcome of the scheduled 1983 Region 2 Administrative Radio Conference (RARC–83), and subject to modification, as the Commission deems necessary, in order to comport with any other policies and rules which the Commission may hereafter conclude are necessary or appropriate in the public interest. Thus, these grants do not include launch and operational authority, or assignment of frequencies and orbital locations. These matters and requests for authorization to construct ground feeder uplink facilities will be addressed in a later proceeding(s).

fication of its common carrier authority involving an Advanced Westar satellite. Insofar as that modification request contemplates use of the 11.7–12. GHz fixed Satellite Service (FSS) frequency band, it is not consistent with the technical parameters set forth in our DBS rule making, Gen. Docket 80–603. We also note that a grant of this modification request may have substantial implications for existing and proposed policies for fixed-satellite service common carrier users operating in that band. Accordingly, it requires separate and additional consideration.

4. For the reasons set forth in the *STC Interim Grant*, at paragraphs 3 and 4, we are considering and acting upon the entire system proposed by each applicant in this initial phase of application processing, but issuing construction permits for only the first operational phase of each applicant's proposal.[7] As applicants seek to complete their operations, they should request subsequent construction permits in the form of minor modifications to their applications.[8] We also note that applicants requested that the Commission consider assigning various regulatory classifications to their particular DBS systems. As indicated in the DBS *Report and Order*, at paras. 82–92, the classification(s) assigned to each DBS operator will be a function of the service(s) it provides and the manner in which it offers those services to customers. Thus, DBS operators will be classified and regulated under the appropriate sections of Title II and/or Title III of the Communications Act and the rules and policies developed in the DBS rule making proceeding. See *Report and Order*, at paragraphs 83–90. In this regard, we note that several applicants that planned not to engage in the programming activities of broadcasters but to offer their programming capacity to others sought to avoid various aspects of traditional common carrier regulation. For example, DBSC sought to be classified as a common carrier but to avoid traditional Title II regulation in some circumstances, citing the Commission's decision in *Competitive Carrier*, 85 F.C.C. 2d 1 (1980). However, that decision does not apply to DBS operators, and these issues have not yet been considered fully in the DBS rule making or in the context of these applications. Although we do not foreclose the possibility of later imposing only limited common carrier regulation on these DBS operators, we do not believe that the record is sufficient to make such findings at this time. *See also: Deregulation of Telecommunication Services*, 84 F.C.C. 2d 445 (1982);

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[7] We previoiusly defined the "operational phase" of a DBS proposal as "a distinct portion of the applicant's overall service proposal consisting of identifiable and independently operating satellites and facilities intended to serve a discrete portion of the entire proposed service area." *STC Interim Grant*, at fn. 8.

[8] While we recognize that it is difficult to predict the growth of a new service, such as DBS, we are concerned that applicants use spectrum efficiently. Accordingly, applicants shall be required to keep this agency informed concerning the implementation dates of their systems. Furthermore, we reserve the right to assign unused spectrum to other applicants where we believe that the systems are not being implemented in a timely fashion.

and *Domestic Fixed Satellite Transponder Sales, Sales,* 90 F.C.C. 2d 1 (1982). Therefore, at this time, we will assign classifications only to those applicants that specifically requested traditional classification, and will defer classification of the remainder of the applicants until later stages of these proceedings. Meanwhile, applicants and other interested parties are free to pursue these classification questions either on reconsideration of this *Order* or on request for launch and operational authority. If and when the Commission determines that DBS operators should not be subjected to conventional Title II and/or Title III regulation, it will be in a position to consider these requests. *See Report and Order,* at paragraph 86 and note 81. In addition, we note here that various applicants have proposed to offer services beyond those specifically designated by the international agreement allocating the 12.2–12.7 GHz spectrum for DBS use. Such uses include the transmission of private business data on subchannels or on the main channels when usual programming is not being transmitted. While the Commission generally allows various non-conforming uses in appropriate situations, such uses must be clearly secondary to the primary authorization of these non-conforming uses until after the results of RARC-83 are known, and until applicants make specific requests for such authorization.

5. Applicants will have a full opportunity to amend their applications after RARC-83 to ensure compliance with the resulting international agreement and to comply with any new matters raised in the ongoing rule making proceeding. However, applicants are put on notice that if, after RARC-83, sufficient spectrum or orbital positions are not available for all construction permits granted in this first phase of processing, they may face comparative hearings or other procedures for allocating available spectrum in this or subsequent processing stages. Finally, we reiterate the cautionary note directed at all DBS applicants in the *Report and Order,* at paragraph 25, that "any risk entailed by proceeding before the [RARC-83] conference lies entirely with DBS applicants."

II. Background

6. We have previously provided a summary review of the history of the development and establishment of domestic policies, rules and procedures for interim DBS systems in the *STC Interim Grant,* wherein we granted the first authorization for a new DBS system. Accordingly, we shall not replicate that information here, except as provided below.

7. By *Notice of Proposed Policy Statement and Rule Making in General Docket 80–603* (*Notice and Policy Statement*), 86 F.C.C. 2d 719 (1981), we set forth proposed policies and conditions to govern the authorization of interim DBS services and, pursuant thereto, invited interested per-

sons to submit applications for new DBS systems.[9] Therein, we found the previously-submitted application of STC to be substantially complete and acceptable for filing (File No. DBS–81–01)[10] and gave notice that interested persons should submit applications to the Commission within 45 days in order to be considered in conjunction with the STC application. As a result of that action,we received thirteen additional applications.

8. On October 22, 1981, we released a *Memorandum Opinion and Order*, 88 F.C.C. 2d 100 (1981), in which we found, based on the general parameters and criteria set forth in the *Notice and Policy Statement*, that a number of the thirteen additional interim DBS applications were incomplete and unacceptable for filing.[11] In addition, on October 28, 1981, we released a *Public Notice*, FCC 81–507, wherein we announced that the above-captioned applications were acceptable for filing. On July 14, 1982, we released the *Report and Order* in General Docket 80–603. Therein, we adopted interim rules and procedures for DBS systems. In light of this *Report and Order*, on September 23, 1982, we adopted the *STC Interim Grant* order referenced above and conditionally granted STC's application, authorizing it to construct the two satellites necessary to initiate the first phase of its national DBS system.[12] With this background information in mind, we now turn to a discussion of the subject applications for DBS authorization and the petitions, comments and responsive pleadings relevant thereto.

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[9] This *Notice and Policy Statement* had as its genesis the *Notice of Inquiry*, 45 Fed. Reg. 72719 (November 3, 1980), in which the Commission began consideration of domestic policies for DBS by requesting comment on two staff reports dealing with DBS, one dealing with technical characteristics of DBS systems and the other with appropriate regulatory policies. *See* Bruno Pattan, *Technical Aspects Related to Direct Broadcast Satellite Systems* (Federal Communications Commission, Office of Science and Technology, September 1980); and Florence O. Setzer, Bruce A. Franca, and Nina W. Cornell, *Policies for Regulation of Direct Broadcast Satellites* (Federal Communications Commission, Office of Plans and Policy, October 1980).

[10] On December 17, 1980, we received an application from STC requesting authority to begin construction of satellites for a satellite-to-home video broadcasting system and placed this application in the docket file to allow comment thereon by interested persons.

[11] However, in that decision we expressly accepted the Focus application proposing use of Advanced Westar "without prejudice to any later determination we might reach concerning these matters." 88 F.C.C. 2d at 114. In a subsequent *Memorandum Opinion and Order*, 89 F.C.C. 2d 177 (1982), we reaffirmed this earlier action by denying petitions for reconsideration. An appeal of these decisions is pending. *National Christian Network, Inc.* v. *FCC*, Case No. 82–1345 (D.C. Cir., appeal filed March 31, 1982).

[12] In the *STC Interim Grant*, we concluded that STC's proposed operation would be in the public interest because, *inter alia*, its proposed service would: (1) "provide the public with additional channels, programming variety, technically innovative services, expanded non-entertainment services, and improved service to remote areas;" (2) provide "[e]conomic benefits includ[ing] creating employment opportunities in high technology and programming sectors of the economy and spurring competition in the home video market;" (3) "promote national goals of advancing the art of satellite communications and maintaining American leadership in the civilian space field." See *STC Interim Grant*, at paras. 36–39.

III. A Description of the Applications

9. In order to provide a background for consideration of the issues raised against the pending applications, this section provides a general description of each of the applications. Specifically, this section includes a description of identifiable phases of each aplicant's service proposal including coverage areas, a description of the type of service proposed, an indication of the regulatory classification(s) proposed, and other pertinent information related to the service offerings of each applicant.

A. The CBS Application

10. CBS requests authority to construct a high definition television (HDTV) satellite system in the 12 GHz band to provide television service for individual and community reception in the United States.[13] CBS proposed that its DBS service not be classified as either common carrier or broadcasting. The application provides a description of the type of service CBS is propos, the technology it intends to employ, and other pertinent information relating to its proposal. CBS states that its legal, technical, and financial qualifications are a matter of public record and well known to the Commission.

11. CBS states that its proposal represents a vehicle by which the present over-the-air, advertiser-supported television service can be upgraded from the 525-line NTSC technology to a higher HDTV technology.[14] CBS states that its proposed system would preserve the Commission's policies of localism and innovative television service. The HDTV satellite system would be designed with two primary objectives in mind: (1) to provide a transitional mechanism to permit over-the-air, advertiser-supported broadcast services to be upgraded to HDTV service; and (2) to offer innovative, differentiated HDTV services to business, industrial, educational, professional and residential users in addition to those offered by terrestrial broadcast services.

12. The entire system would consist of four in-orbit satellites with combined nation wide coverage and would be capable of providing three channels of HDTV service from each satellite. The initial phase of the system would consist of two satellites, one to provide service to the eastern time zone area and a second to serve as an in-orbit spare. The second satellite would be brought into full service following the experi-

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[13] CBS describes HDTV as a "television service which features significantly improved picture resolution with additional scanning lines, improved color rendition, large screen and wide screen aspect ratio."

[14] DBS claims that a satellite-based HDTV service would provide the most efficient and meaningful use for the 12 GHz band and that reservation of this band for HDTV purposes would "increase the likelihood of multiple HDTV satellite systems" and "provide a substantially stronger impetus to HDTV development."

mental stage, and serve as the operational satellite for the central time zone. The fully operational national system would consist of four satellites, each serving one time zone, and one or two in-orbit spares.[15]

13. The system's first channel would be designed to provide HDTV satellite service to terrestrial television stations for retransmission to homes. It also would be designed to provide HDTV service directly to those homes not served by terrestrial HDTV stations. According to CBS, this would provide a stimulus to the manufacture and sale of HDTV home receivers nationwide. This service would be advertiser-supported.

14. The second channel of HDTV satellite service would provide entertainment and information programs to supplement program service on the first channel. This channel may be supported by per-channel or per-program charges. The second channel would be provided to cable systems or directly to home viewers.

15. The third channel of HDTV service would be for subscriber-supported uses, including satellite-to-theater movie distribution, and professional, industrial, business, and residential services. However, all of the three channels could be used in off-peak hours for ancillary uses such as distributing entertainment, professional, medical, business or industrial programming. The services provided on all three of the CBS HDTV channels would be scrambled.

B. The DBSC Application

16. DBSC requests authorization to construct and operate a DBS system in order to provide transmission capacity for hire as a communications common carrier under the general provisions of Title II of the Communications Act.[16] DBSC states that it is legally, technically, and financially qualified to provide DBS services and submits information in its application relative to these qualifications.

17. The DBSC system would consist of three satellites serving the continental United States (CONUS) and an in-orbit spare.[17] However, the initial phase of system operation would involve only one satellite. under its overall service proposal, the CONUS would be divided into three service areas or zones with each of the three satellites serving approximately thirty-three percent of the total CONUS area with six primary television channels per service area.[18] In addition, the system would be

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[15] As the system progresses, spot beams would be designed to cover the main population areas in Hawaii and Alaska.

[16] Prior to offering service, DBSC indicates that it will file any further applications for authority that are required and will make appropriate tariff filings pursuant to Titles II and III of the Act.

[17] The in-orbit spare would be designed to substitute for any of the operational satellites in the event of a malfunction or to provide individual zone or spot beams.

[18] The eastern zone would extend from the East Coast to Chicago, Illinois, and New Orleans, Louisiana. The central zone would extend from Chicago and New Orleans to Billings, Montana, and Santa Fe, New Mexico. The western zone would extend from Billings and Santa Fe to the West Coast.

designed to provide spot coverage to two smaller areas within each service zone, with each spot beam covering about ten percent of the geographic area of the zone. Up to four additional television channels in each of the two spot beam areas would be provided. The spot coverage locations for its system would be movable and would be used to provide service outside the CONUS to such areas as Alaska and Hawaii.[19] Further, the DBSC system would be able to provide HDTV service using spot beam coverage.

18. DBSC intends to function as a provider of transmission capability in a fashion similar to existing terrestrial common carriers who distribute video programming supplied by others.[20] It proposes to file tariffs offering service on a first-come, first-serve basis and to comply with applicable statutory prohibitions against unreasonable, unjust, and unduly discriminatory charges. However, because it does not believe that it will posses market dominance, DBSC believes that it should be subject to minimal Title II regulation, based upon the regulatory principles articulated in the Commission's recent decision dealing with competitive common carriers.[21] DBSC states that because it will not control the selection or content of program material, it should not be subject to traditional content regulation but should be subject only to "technical" broadcasting regulations.

19. DBSC anticipates that a major portion of its satellite capacity would be leased to program suppliers who make their services available to the public without charge. These program services would be supported primarily by advertising. On the basis of inquiries for transponder space, DBSC anticipates that a wide variety of individuals, groups and companies would provide programming over its system, including nonprofit groups such as the Joint Council for Educational Telecommunications and the Public Satellite Service Consortium. DBSC would encourage noncommercial and public service applications of DBS by reducing the rates to such users by fifteen percent. DBSC submits that no legal barrier exists to its proposal for public service access and reduced rates.[22]

20. Although DBSC would operate its transmission service as a common carrier, it proposes to market twenty percent of its transmission

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[19] Spot beams to areas outside the CONUS, such as Alaska and Hawaii, would be available from one or more of the CONUS service zone satellites.

[20] DBSC does not propose to sell or rent home receive antennae to the public.

[21] In this connection, DBSC cites *Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations*, 85 F.C.C. 2d 1 (1980).

[22] DBSC states that while the Communications Act bars "unjust and unreasonable discrimination," it permits classifications of rates, charges and services (47 U.S.C. § 201(b)). In addition, according to DBSC, there is no realistic possibility of it engaging in cross-subsidization or in anti-competitive activities under this aspect of its proposal. Rather, DBSC maintains that the rate differentiation it proposes for nonprofit organizations will serve the public interest by ensuring that entities without resources to meet ordinary commercial requirements will stil be assured access to DBS service.

capacity on the basis of demand.[23] According to DBSC, this aspect of its proposal would allow it to control access, charges, and terms and conditions for the sale of such transmission capacity outside the regulatory constraints of Title II of the Act.

C. The Focus Application[24]

21. Focus requests interim authorization to provide an experimental DBS service on the Advanced Westar satellite system. Focus states that Western Union tentatively has agreed to make available to it transponder capacity necessary to provide DBS services on the Advanced Westar shared spare satellite scheduled for launch by NASA on January 25, 1984. Focus requests classification as a broadcaster subject to regulation under Title III of the Communications Act. Its application provides a general description of its proposal including technical, financial and other information relating to its qualifications to provide an experimental DBS service.

22. Using Western Union's third Advanced Westar satellite,[25] Focus considers it possible to provide a DBS-type service one to two years before any authorized DBS system. Under this arrangement, Focus suggests that by early 1984, the United States would have a working DBS prototype to provide the Commission, the industry and the public with helpful information that would facilitate resolution of the complex issues involved in the development of DBS regulations.[26] Its basic service objective would be to demonstrate the technical and economic practicability of direct satellite broadcasting to homes and businesses.

23. Eventually, Focus proposes to transfer its DBS-type service onto a satellite system authorized for DBS use. Focus indicates that this transfer would be accomplished through lease arrangements with carriers offering DBS space segment capacity or through its own DBS system if approved by the Commission.[27]

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[23] DBSC states that market information gathered during initial operations will substantially assist the Commission in establishing financial and operational regulations for permanent DBS operations.

[24] This description is included to demonstrate clearly that the Focus application proposes to lease transmission capacity for the provision of DBS services rather than to operate a DBS system.

[25] The third satellite referred to is the shared spare in the RDRSS/Advanced Westar series, for which Western Union received authorization to lease 50 percent of its transmission capacity for the provision of communications common carrier services.

[26] In furtherance of its request, Focus states that Section 303 of the Communications Act permits the Commission to authorize operations on an experimental basis if the public interest would be served thereby. It also states that Sections 5.253(e) and 74.103(d) of the Commission's Rules provide for experimental use of frequencies upon a finding that the public interest would be served by rendition of such service.

[27] Because of the uncertainty surrounding the availability of transponder capacity in the future, Focus adds that it has filed its own application for authority to construct and operate a DBS satellite system to accommodate its own, and its customers' future needs. However, in our *Memorandum Opinion and Order*, 88 F.C.C. 2d 100 (1981), we found that application, as well as certain other applications, to be incomplete and unacceptable for filing. *See also Memorandum Opinion and Order*, 89 F.C.C. 2d 177 (1982) (dismissing petitions for reconsideration), *appeal pending sub nom. National Christian Network, Inc.* v. *FCC*, Case No. 82–1345 (D.C. Cir., appeal filed March 31, 1982).

D. The Graphic Application

24. Graphic requests authority to construct a DBS system that initially would provide two channels of subscription television service, plus auxiliary service to individual homes throughout the United States and its possessions. In its application, Graphic provides information relative to its legal, financial, and technical qualifications to provide its proposed DBS service.

25. When fully implemented, Graphic's system would consist of two satellites, one to serve the western half and one to serve the eastern half of the United States. An in-orbit spare satellite for back-up service for either its western or eastern operational satellite also is planned. In the initial phase of its operations, Graphic would provide satellite coverage to only the western half of the contiguous 48 states.[28] The second satellite, to be launched later, would provide coverage to the eastern half of the United States. Each satelite would be programmed independently with the initial satellite operating in the Mountain Standard Time (MST) zone and the second satellite in the Eastern Standard Time (EST) zone. Graphic's fully operational system would offer service to Alaska, Hawaii, Puerto Rico, and the Virgin Islands through the use of spot beams. However, total coverage would not be available until its system becomes fully operational.

26. The Graphic system would provide two channels of entertainment and information television programming with stereo and/or second language audio to individual homes on a subscription basis. The video would be NTSC color (CCIR M). Graphic would retail this two-channel full-time package for a monthly charge of $24.95 and an installation charge of approximatey $300. Graphic's proposed system also would make available to all subscribers ancillary services such as closed-captioning, teletext, and stereo-multiplexing of audio subcarriers. Subscribers would need their own equipment to receive these services. Two audio channels would be used, one to carry standard program audio and a second channel to transmit foreign language translations, audio services for the blind, data/facsimile communications, background music, or aural-stereo programs. The retrieval feature of the proposed teletext services would use traditional telephonic communications. Retailing of the proposed services would be accomplished by affiliated and retail outlets, such as appliance stores that also would provide installation and service.

E. The RCA Application

27. RCA requests authority to construct a DBS system that would be programmed primarily by other parties. Although RCA would offer its

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[28] Graphic would provide service to this area first because the Mountain Standard Time (MST) zone has less television service (cable television, UHF or VHF television broadcasting, STV or MDS) than the other time zones.

transponder capacity for use by others, it seeks not to be classified as a common carrier. In its application, RCA submits information relative to its legal, technical, and financial qualifications and other pertinent information relative to its proposal.

28. When fully implemented, RCA's proposed system would consist of four satellites capable of serving the contiguous United States, Alaska and Hawaii. It also would have an in-orbit operational spare and an on-ground spare. Each operational satellite would provide service to an area of the United States roughly corresponding to each time zone. The satellite serving the Pacific time zone also would serve Alaska and Hawaii. RCA anticipates commencement of the first phase in the Eastern time zone within four years of the grant of authority. It would launch satellites for each of the remaining time zones within four years after institution of service in the Eastern time zone.

29. Each satellite would have six transponders. For each transponder, RCA is specifying a channel bandwidth of 24 MHz for regular program service. However, two of the six transponders would offer the option of wideband operation. By ground command, either of the two would be capable of switching from regular 24 MHz service to 72 MHz in order to accommodate such experimental services as high definition television (HDTV) or other entertainment, information, or educational programming. In addition, RCA's satellite would be able to provide two high quality program audio signals to permit transmission of stereophonic music and other audio programs.

30. RCA will offer its satellite channels to programmers and other entities. RCA indicates that a limited number of channels would be available on each satellite. Accordingly, it will limit the availability of facilities to relatively few users, especially if each user requests multiple channels. Because the cost per transponder is relatively high and the number of users will be limited, RCA seeks to retain discretion as to the choice of users. For these reasons, RCA requests that traditional common carrier regulation not be applied. In addition, RCA indicates that it may retain one or more television channels for its own use or for use by associated companies, including the National Broadcasting Company and its affiliates.

F. The USSB Application

31. USSB requests authority to construct a DBS system to provide advertiser supported television and audio service for individual and community reception in the United States. The applicant presumes that its service proposal would lead it to be classified as a broadcaster. USSB provides information in its application and amendments relating to its legal, financial, and technical qualifications and other pertinent information related to its proposal.

32. When fully implemented, USSB's DBS system would consist of four satellites, each designed to serve an individual time zone with three channels of television programming and ancillary services. The initial space segment of its system would consist of two satellites and an in-orbit spare. An eastern satellite would provide service to the Eastern and Central time zones and a western satellite would provide service to the Mountain and Pacific time zones. Each beam would carry three television channels with three associated subcarriers, one for program audio, another for stereo or a second language, and a third for specifical services or for system service and control functions. All of the satellites would have the capability to function as either a western or eastern operational satellite by means of ground command. The second phase of USSB's system would include subsequent satellites designed to cover individual time zones. This would be accomplished by redirecting by ground control each of the initial satellites to serve only a single time zone following the launch and positioning of the subsequent satellites.

33. USSB would offer its satellite program services to full service television stations, low power television stations, and directly to viewers. Under its proposal, a full service television station licensee from each television market would be given an opportunity to participate as a member of its system.[29] The first option to participate would be offered to independent television stations. If no full service television station in a community wished to participate, membership would be offered to a low power television station. Member stations would need receive equipment, and members in the top fifty television markets would also be required to have uplink capabilities. The full service station members would have exclusivity rights within their Grade B service areas for USSB programs aired. If a member station decided not to carry any particular system programming, other stations in the community would be provided an opportunity to broadcast it. USSB would provide a special membership category for low power television stations situated outside the Grade B service area of a full service member station. The general public would have the choice of receiving USSB's programming from the satellite or from local member stations.

34. USSB would provide three channels of program service consisting of news and public affairs, entertainment, children's and cultural pro-

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[29] USSB indicates that inclusion of community reception at member stations for rebroadcast will not alter in any way the development of planning methods for individual reception systems as set forth in Resolution 701 "resolve" 5 WARC–79 *Final Acts*, and, indeed, states that this is specifically permitted under the definition of broadcast satellite service in RR 3105 (5.15) (since renumbered as RR 124). Moreover, USSB further states that the two signal delivery modes are expected to complement each other. It also notes that community reception at member stations for rebroadcast would reduce the potential problem of interference to DBS viewers from fixed terrestrial microwave systems.

gramming. The system's first channel of service would consist of advertiser-supported television programming. In this connection, USSB would sell national advertising and would make advertising spots available to member stations.[30] The second channel of service would carry a 24 hour-a-day national news and information service. For this service, USSB would rely in large part on news stories and program features provided by member stations through uplink facilities. In addition, USSB would maintain news bureaus throughout the world. Its third channel would be used to carry other television programming as channel requirements increase. In addition, its system would offer the option of educational programs specifically designed for schools and adult education, and enhanced services including captioning for the hearing-impaired, teletext and view data services. All of these services would be provided by USSB free of charge. USSB also intends to participate in the development and implementation of HDTV. During periods when HDTV is being broadcast by the system, individuals not having HDTV equipment could receive the programming service on conventional sets from rebroadcasts by terrestrial television stations.

G. The VideoSat Application

35. VideoSat requests authority to implement the first phase of a DBS system. In its application, VideoSat provides information relative to its legal and technical qualifications, financial projections relative to its proposal, and other pertinent information.

36. VideoSat proposes a direct broadcast system that would provide a program service supported by commercial advertising. The service would cover all of the United States, including Alaska, Hawaii, and Puerto Rico. In the first phase of its operations, VideoSat would provide one channel of programming to each of the four US time zones using two satellites with two transponders each.[31] When fully operational, the system would consist of four in-orbit satellites and one ground spare.

37. VideoSat would scramble its DBS broadcast transmissions, but would not charge home customers for the service. Uplink transmissions would originate from its broadcast center in Naples, Florida, and would be delivered to homes either directly or through existing terrestrial television stations or cable systems. Terrestrial broadcast stations that elect to carry a minimum schedule of VideoSat programming would be

[30] In addition, USSB would compensate member stations that retransmit its programming whether or not the public chooses to view the programming from the member station or directly from the satellite.

[31] On June 8, 1982, VideoSat filed an amendment to its July 15, 1981, application specifying several technical and other changes. To the extent that this amendment requests additional satellites and/or transponders in either of its operational phases, it would constitute a major modification of the timely filed application, and therefore, is rejected and not described or considered herein.

given program carriage exclusivity in their market areas. VideoSat would unscramble the signal for home reception in all other areas. The applicant intends to develop scrambling and unscrambling devices that would be compatible with those used by other broadcast satellite subscription services.

38. VideoSat proposes to carry the programming of Dominion Satellite Network, Inc., Naples, Florida. Dominion is a new program service that would provide entertainment and educational programming for general family viewing, as well as news, public affairs, and special features. Dominion would also rebroadcast independently produced features. Dominion would initially have its international headquarters and broadcast electronics center in Naples, Florida. VideoSat's system would provide National Television System Committee (NTSC) color video signals, with a choice of 2 audio channels and a control subcarrier. Although VideoSat does not plan to incorporate a high definition television service into its initial phase, it does plan experiments during non-service hours with digital and bandwidth compression techniques. VideoSat may also provide a variety of other program services in a common carrier capacity.

H. The Western Union Application

39. Western Union requests authority to construct a DBS system. It also requests modification of its existing authority to utilize capacity on the Advanced Westar satellite system in order to provide an early DBS-type service prior to construction and operation of a more permanent DBS system. Because Western Union states that it does not plan to function as a common carrier, it requests that it not be classified and regulated as a common carrier.[32] In its application, Western Union has submitted information relative to its legal, technical, and financial qualifications to provide DBS services.

40. When fully implemented, Western Union's proposed system would consist of four satellites, each with four transponders capable of serving the contiguous United States, Hawaii, Alaska, Puerto Rico, and the Virgin Islands. Western Union also would use two in-orbit backup satellites. Under the first phase of its proposed system, one satellite would be positioned to provide service to the Eastern and Central time zones, Puerto Rico, and the Virgin Islands. Another satellite would be positioned to provide service to the Mountain and Pacific time zones, and spot beam service to Alaska and Hawaii. Later phases of the system include plans for two additional satellites. When these latter satellites become operational, each satellite would provide service to an area roughly corresponding to each time zone. The satellite serving the eastern time

[32] Western Union requests not to be classified as a common carrier with respect to its service offerings on its proposed DBS system and its proposed early DBS-type service on Advanced Westar.

zone also would provide service to Puerto Rico and the Virgin Islands, while the satellite serving the western time zone also would provide service to Alaska and Hawaii. The Western Union system would be designed to allow allocation of transponders between time zones in order to accommodate the needs of its customers. Accordingly, each satellite would be able to transmit four programs to two service areas in any combination, switchable by ground command.

41. Western Union would make its DBS capacity available to others for their use in distributing programming to the public. In this connection, Western Union proposes to choose among potential users in order to assure a suitable group of such users on its satellite. Western Union may distribute programming under its own control to the public on channels not otherwise committed. The primary service to be offered would be the provision of uplink and downlink television channels to others who would program and market the service to the public. The DBS system would permit local advertising or programming if desired by program users. The proposed transmission plan would provide for reception of National Television System Committee (NTSC) color video signals. In addition, three additional baseband subcarriers would be provided for such applications as multi-language, stereo, information and other data services.

42. Western Union believes that 1985 will be the earliest any applicant including itself could deploy the initial phase of DBS service. However, the Advanced Westar "shared spare" satellite that is scheduled for launch in the 1983–1984 time period will be available about two years earlier. For this reason, Western Union requests modification of its existing authority to lease capacity on the Advanced Westar satellite system to provide an early DBS-type service.[33] By use of the Advanced Westar satellite, Western Union proposes to test the viability of a DBS system and to verify system and transmission performance (including the transmission of high definition television (HDTV)) prior to the launch of a dedicated broadcast satellite. Although the Advanced Westar satellite is designed to operate in the Fixed Satellite Service and is equipped to operate at frequencies in the 11.7 to 12.2 GHz band rather than the 12.2 to 12.7 GHz band designated for DBS service, Western Union believes that any additional intersatellite interference introduced by DBS transmission on Advanced Westar can be coordinated successfully. In connection with its request for modification, Western Union requests a waiver or departure of any applicable rule or policy in order to permit use of the Advanced Westar "shared spare" satellite for experimental DBS operations. See paragraph 3, *supra*.

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[33] Western Union refers to our *Memorandum Opinion and Order and Authorization* (FCC File No. W–P–C–1752), FCC 80–716, 86 F.C.C. 2d 196 (released January 31, 1981), wherein we authorized Western Union to lease fifty percent of the Advanced Westar capacity for the provision of communication common carrier services.

IV. General Issues Raised in the Petitions to Deny[34]

A. Procedural Issues

43. *Allegations*—Several petitioners take issue with various aspects of the procedure the Commission has followed in entertaining the DBS applications in conjunction with the rule making proceeding. Raytheon contends that the Commission should not have closed the record on the applications before the adoption of final rules in the DBS rule making. SDT and NAB contend that consideration of the applications should be deferred until the interim rule making has been concluded and action on SDT's associated petition for reconsideration has been taken.[35] SDT asserts that the applicants needed more guidance concerning what the Commission's criteria would be for selecting licensees.

44. The Utilities and NAB contend that grant of the DBS applications before the adoption of rules and technical standards would violate the Administrative Procedure Act. NAB specifically cites Section 553 of that Act. NAB and Raytheon explain that granting applications now would be equivalent to adopting substantive policy without allowing public comment.

45. The Licensees and NAB stress that the Commission cannot judge the qualifications of potential licensees and proceed with DBS service authorizations without first adopting a regulatory model or classification. Similarly, ABC maintains that without these judgments, basic allocations decisions cannot be made. Several parties state that the need for qualifications criteria is illustrated by the applicants' financial showings, that would fail by conventional standards, and by their inability to demonstrate legal qualifications due to plans to sell large amounts of stock to persons yet unknown. The Licensees contend that applicants should demonstrate adequate financial qualifications just as terrestrial broadcast applicants, because the DBS spectrum similarly is limited and because consumers must make a considerable investment in equipment to receive an applicant's signal. MST states that all of the financial showings submitted are inadequate, and questions the basis for distinguishing and rejecting NCN's application.[36]

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[34] As indicated, *supra*, at note 3, objections to general DBS policy matters that already have been resolved in the DBS *Report and Order* will not be treated in detail herein. Instead, appropriate references will be made to the *Report and Order* pertaining to such matters.

[35] We note that action on SDT's petition for reconsideration was taken in *Advance, Inc., et al.*, 88 F.C.C. 2d 100 (1981), *recon. den.*, 89 F.C.C. 2d 177 (1982).

[36] MST specifically challenges the financial showings of DBSC, USSB, and CBS. It claims that they are no more substantive than the "showing" of NCN, whose application was rejected. This objection by MST apparently results from a misunderstanding of the reasons why the Commission found that the applications of NCN and certain other applicants contained insufficient information to be considered minimally acceptable for filing. *Advance, Inc., et al.*, 88 F.C.C. 2d 100 (1981). Although that *Order*

46. MST asserts that the forty-five day period provided for commenting on the applicatons was too short, considering the number and the tremendous variety of the proposals and the specifics of each proposal. In this regard, it points out by way of comparison, that forty-five days was the time allowed for comment on the single DBS application by STC. Several petitioners state that it is necessary to raise these procedural and substantive issues in the context of the specific DBS applications because they were not adequately addressed in the *Notice of Inquiry* or the *Notice and Policy Statement.*

47. The Affiliates, the Utilities, MST, and Syndicated state that any grant of DBS applications will harm the United States' negotiating position at the RARC-83 Conference. They contend that the United States will be committed to protect the investments made by DBS licensees, thereby severely reducing the government's negotiating flexibility. CBS asserts that the goal of demonstrating a high degree of interest in the 12 GHz band for DBS can be accomplished by the mere pendency of the applications, as well as the attendant publicity.

48. *Discussion*—Prior to action on the first DBS application, final rules governing DBS interim applications and service were adopted in the DBS *Report and Order.* The Commission has already found: that ample opportunity was provided to all interested parties for comment on both the final rules and on the specific applications filed;[37] that DBS service is in the public interest;[38] that sufficient guidance existed for prospective applicants to submit acceptable applications prior to the cut-off period;[39] that it was neither necessary nor desirable to adopt a specific regulatory model or to apply stringent terrestrial broadcast qualifications requirements on

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mentioned the financial aspect of the applications, it clearly states the broader basis for its holding: "Our conclusion that the subject applications are unacceptable for filing, however, is based principally upon the applicants' failure to provide us with even the minimal technical information requested in the *Notice*. The absence of information that would permit us to evaluate the applicants' legal and financial qualifications, while also a significant omission in our view, is relevant principally as further evidence that the unacceptable applications provide almost no information that would allow us to evaluate the public interest in authorizing the proposals." *Id.*, at paragraph 34.

[37] *See STC Interim Grant* at paragraph 23. As was the case of STC's application, we note that no petitioner amended its petition subsequent to the adoption of the DBS *Report and Order* and prior to the action taken herein.

[38] *See* DBS *Report and Order,* at paragraph 21. NAB specifically has challenged the Commission's use of the verb "may" in describing the potential benefits of DBS service in the *Notice and Policy Statement*. While the DBS *Report and Order* expresses the potential benefits of DBS more definitively, the Commission cannot know with certainty the ultimate outcome of this experiment. It has found that the potential benefits of DBS service, and their likelihood, outweigh the attendant costs. The presence of unpredictable factors cannot itself impede the development of new facilities and services. The very nature of such experimentation is to explore. As expressed by USSB, "neither the Communications Act nor the Administrative Procedure Act requires the Commission to demonstrate uncanny sagacity in making public interest findings."

[39] *See Advance, Inc., et al., supra.*

DBS applicants during this initial period of development;[40] and that the grant of authorizations to begin satellite construction prior to RARC-83 would not adversely affect the United States's negotiating position at that conference, but would rather enhance it.[41] These findings and actions effectively render moot the majority of the objections raised by the petitioners in this regard. The need to expedite this proceeding already has been chronicled in the *Notice and Policy Statement* and in the DBS *Report and Order.*[42] Finally, no petitioner has made a compelling demonstration that the forty-five day period allotted for petitions to deny DBS applications was too short to permit full review of the applications and comment thereon. The number and volume of the petitions and other comments would appear to belie that contention.[43]

B. 307 (b) Issues

49. *Allegations*—NAB and ABC state that a grant of the applications would contravene Section 307(b) of the Communications Act of 1934, as amended.[44] ABC incorporates by reference its comments on this issue in Gen. Docket No. 80–603, and NAB repeats the comments it made in its petition to deny STC's application. Both parties maintain that Section 307(b) mandates local broadcast licensing and service, and that only Congress can dictate a change from that service to authorize national, non-local DBS service.

50. *Discussion*—The Section 307(b) issues raised above largely are repetitious of the issues addressed in the *Notice and Policy Statement.* They since have been readdressed and resolved in the DBS *Report and Order. See also, STC Interim Grant,* at paragraphs 75–79. Among other things, it previously has been noted that the Commission has broad discretion to select the means of implementing the distribution of radio

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[40] DBS *Report and Order,* at paragraph 89 *et seq.* The Commission's financial "standard" is explained at paragraph 114 of the *Report and Order.* See also *STC Interim Grant,* at paragraph 98.

[41] DBS *Report and Order,* at paragraphs 24, 25; *Notice and Policy Statement,* at paragraph 64 *et seq. See also STC Interim Grant,* at paragraph 104.

[42] In addition to the reasons previously stated for the expedited nature of this proceeding, USSB states that the deadline for making reservations on the Space Shuttle in time to meet the prospective launch dates for these applicants already is approaching, making such expedited consideration additionally important. USSB believes that advancing a deposit for a Space Shuttle reservation without prior Commission authorization would constitute a pre-construction violation of Section 319 of the Communications Act. 47 U.S.C. § 319. DBSC compares the need for expedited treatment of DBS applicants to the same need recognized for the inauguration of other recent satellite services, specifying the cases of Satellite Business System service, *U.S.* v. *F.C.C.*, 652 F. 2d 72 (D.C. Cir. 1980), and DOMSAT service, *Report and Order* on *Domsat*, 22 F.C.C. 2d 86 (1970).

[43] In this regard, USSB has pointed out that STC filed a 155 page opposition to fourteen petitions to deny its application, and that USSB filed an opposition to twenty-one petitions to deny its application in less than fifteen days during a major holiday season.

[44] Section 307(b) provides that "In considering applications for licenses, . . . the Commission shall make such distribution of licenses . . . among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." 47 U.S.C. § 307.

service under Section 307(b) of the Act, that the Commission's policy of "localism" has been an exercise of that discretion, and that the Commission has the authority to authorize nonlocal broadcast service where it will advance the goals of the Communications Act and serve the public interest. *Id.*

C. Multiple and Cross Ownership Issues

51. *Allegations*—The Licensees, ABC, and DBSC contend that grant of some of the applications would violate one or several of the Commission's multiple- and cross-ownership restrictions. The Licensees stress that those ownership restrictions are desiged to ensure the broadcast of diversified viewpoints and to avoid undue concentration of media control. Petitioners state that a Commission decision to abandon these restrictions for DBS licensees while enforcing them against conventional broadcasters is unlawfully arbitrary, citing *Burinskas* v. *National Labor Relations Board*, 357 F. 2d 822 (D.C. Cir. 1966). DBSC contends that DBS service represents an opportunity to disperse broadcast ownership and reduce current network dominance, and that suppression of competition and restraint of diversity has the same "pernicious" effect regardless of the transmitting technology employed. Accordingly, it asserts that RCA and CBS should not be permitted to operate DBS systems.[45] It contends that its own application suffers no such faults because DBSC is not a "communications conglomerate" and because it proposes to operate as a common carrier.

52. *Discussion*—The contentions raised here by petitiones have been considered fully in the DBS *Report and Order* at paragraphs 91–98. In that *Order*, the Commission found that the goal of obtaining a diversity of viewpoints would be promoted by the introduction of DBS service, but that the development of the service could be seriously impaired by unnecessary limitations on the participants or on the number of channels allowed for each.[46] At the same time, the Commission found the development of undue concentration of control and consequent abuse of market power to be an unlikely possibility that could be addressed later by the Commissiion and could be prevented in any event by the enforcement of

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[45] DBSC claims that there is no public benefit to be derived from expansion into another area of video transmission by these companies. It claims that their broadcasting experience would not be lost by denying them licenses because their programming could be distributed using a common carrier DBS satellite. Furthermore, it asserts that several applicants are interested in RCA satellites and hardware for their own DBS operations.

[46] The public interest in the full participation in DBS by experienced broadcasters and programmers already has been recognized by the Commission in the DBS *Report and Order*, at paragraph 97. Contrary to DBSC's apparent misapprehension, the Commission's action is guided by its concern for the provision of the best service to the public. Accordingly, RCA's and CBS's applications will be considered equally with those of the other applicants.

existing antitrust laws.[47] The Commission also found that distinct regulatory policies are appropriate for DBS service because of the nature of the participation in this new service and the implications of that participation, as distinguished from comparable participation in conventional broadcasting.[48] Grant of these applications does not violate existing ownership restrictions.

D. Impact on Existing Broadcasting Issues

53. *Allegations*—The Affiliates, NAB, and MST state that there is an unresolved issue concerning the extent of DBS impact on local stations and their service that must be settled before any DBS applications can be granted. MST states that no assessment of DBS impact on local broadcasters has been made. NAB contends that the finding in the *Notice and Policy Statement* that DBS will cause only negligible harm to local broadcasters is unsupported, that the studies upon which that conclusion is based are inaccurate, and that the *Notice and Policy Statement* ignores the negative impact DBS will have on STV. The Affiliates and NAB assert that authorization of DBS will have a greater impact on local service than originally anticipated due to the number of additional applications now before the Commission. The Affiliates add that the Commission can no longer rely on earlier studies that considered the impact on local services of only one or two DBS channels. MST points out that the *Notice and Policy Statement* recognized that additional DBS channels would increase the impct on local stations, but that the Commission refused to "speculate" on "events which may never occur."

54. *Discussion*—The Commission already has considered the likely effect of the introduction of DBS service on local broadcasters, including STV operators, in the DBS *Report and Order.* It first found that there was no conclusive evidence of a measurable adverse effect on existing broadcasting services that would result in a net loss of service to the public from the introduction of DBS service. It concluded that it "should not refuse to authorize a potentially valuable new service solely on the basis of speculative allegations concerning possible reduction in service from other sources." It also concluded that "even if DBS systems were likely to affect the availability of programming from other sources, we believe that their potential benefits are sufficiently great to outweigh some loss of other programming." DBS *Report and Order,* at paragraph 44. *See also STC Interim Grant,* at paragraphs 55 and 56. Further, the Commission made it clear that its conclusions were based on the assumption that there could be many DBS systems.[49]

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[47] DBS *Report and Order,* at paragraphs 95–98. *See STC Interim Grant,* at paragraph 62.

[48] DBS *Report and Order,* at paragraphs 91–98. See also *STC Interim Grant,* at paragraphs 71 and 72.

[49] *See Report and Order,* at paragraphs 38–44.

E. Mutual Exclusivity Issues

55. *Allegations*—The Licensees, ABC, and Syndicated raise the questions concerning the physical and economic mutual exclusivity of these applications. Based upon the number of applications now before the Commission, the Licensees remark that physical exclusivity cannot be determined until spectrum and orbit allocations are made at RARC-83. The Licensees and ABC state that STC made a *prima facie* showing in its application that any applications beyond its own would be economically mutually exclusive.[50] The Licensees contend that no other market analysis has been offered to contradict that showing and they cite several cases that allegedly establish the Commission's obligation to decide among applications that are mutually exclusive for economic reasons.[51]

56. In response, DBSC asserts that the criterion for determining mutual economic exclusivity is the harm to the public that would result from the presence of too many operators.[52] It states that there has been no showing of any harm to the public resulting from any failure of some DBS operators, and points out that in such an event the orbital locations and spectrum will revert to the Commission for further assignment. It further states that the studies concerning the number of pay DBS channels that the public will support assume a single DBS operator and that the studies do not address the subject of "free" DBS services and common carrier DBS services. It also maintains that the presence of multiple DBS operators is likely to increase the market for all DBS operators.[53] DBSC and USSB urge the Commission to follow the precedent it applied when authorizing specialized common carrier microwave services of letting the marketplace decide which operators will succeed. *See Specialized Common Carrier Services*, 29 F.C.C. 2d 870, 926–27 (1971). STC asserts that the inability firmly to project the demand for DBS service at this time is not sufficient reason to delay implementation of the service. It states that a key aspect of the "experiment" being undertaken is to establish the level of demand for various DBS services, which is better done by the practical application of market forces than in a hearing. STC refers to the Commission's implementation of Domsat service wherein the Commission recognized that there were too many applicants, but deicded that the exact market potential was not subject to evidentiary proof at hearing. *Report and Order on DOMSAT*, 22 F.C.C. 2d 86 (1970); *Second Report and Order*

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[50] The Licensees and ABC refer to a market analysis submitted by STC with its application that was given this interpretation by NAB in its petition to deny the STC application.

[51] The primary cases cited by the Licensees are *Delta Airlines, Inc.* v. *Civil Aeronautics Board*, 228 F. 2d 17 (D.C. Cir. 1955), and *TRT Telecommunications Corp.*, 46 F.C.C. 2d 1042 (1974).

[52] DBSC cites *United Video, Inc.*, 69 F.C.C. 2d 1629 (1978).

[53] DBSC refers to a study it submitted with its application that concludes that market penetration is in part a function of the cost per channel to the consumer, *i.e.*, as the number of available channels increases, more consumers will be willing to invest in receiving equipment.

on DOMSAT, 35 F.C.C. 2d 844 (1972). STC notes that this approach served especially well in that case because the early demand projections proved to be too low.

57. *Discussion*—The Commission has considered the possibility that insufficient spectrum or orbital locations will be allocated at RARC-83 to meet the spectrum and orbital location requirements of all DBS proposals. Applicants have been on notice that any authorization granted herein is subject to the results of RARC-83, and that, when granting any applicant final authority to operate, the Commission may restrict the number of channels, limit or modify the proposed service area, or impose other conditions it deems necessary.[54] Moreover, because we are granting construction permits for only the first phase of each applicant's DBS proposal, we will have considerble flexibility when addressing any spectrum allocation problems that may result from RARC-83. All authorizations granted herein are conditioned accordingly. If RARC-83 does result in the mutual exclusivity of these applications to any extent, further action will be taken at that time. The possibility of such an eventuality does not justify delaying the prompt implementation of these proposals. See DBS *Report and Order* at paragraphs 25 and 27.

58. Petitioners have presented no facts or arguments that would persuade us to impose an arbitrary limit on the number of DBS operators. The Commission has found that the public will be served best by the expeditious introduction of a wide range of DBS services, and that goal has been a basis for rules and procedures adopted and followed in the DBS proceedings to date. The large number of applicants proposing DBS service appears to further that goal significantly, and the proceedings required to establish an optimal number and assortment of DBS operators, and then to select among the applicants, would introduce needless delay.[55] Accordingly, because petitioners have failed to demonstrate any public interest in limiting the number of participants in DBS service at this time, no such restrictions will be imposed.[56]

F. Experimental Nature of the Application

59. *Allegatiions*—Several of the petitioners state that the pending DBS authorizations cannot be considered interim or experimental. The Affiliates, the Licensees, ABC, CBS, and NAB variously state: that the proposals represent an experiment only in marketing; that even if the

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[54] DBS *Report and Order,* at paragraphs 25 and 112.

[55] The Commission cannot determine at this time the precise level of service the market eventually will support. Such capacity will depend on a variety of factors including the level of competition from other video services and the overall quality and variety of DBS services available on any particular set of receiving equipment.

[56] This action follows the precedent of our action in authorizing specialized common carrier service and Domsat service. *See* paragraph 56, *supra.*

DBS proposals are arguably experimental, the courts and the Commission generally disapprove of this type of experiment;[57] that the investment required for DBS by both the operators and consumers is too great to seriously consider later suspension of service as a realistic possibility; and that it would be impractical to withdraw the service once started "because of its disruptive effect."[58] CBS adds that granting all of the applications simply for market testing analysis is a gross misuse of the spectrum. Syndicated proposes that the Commission select only a sampling from among the applicants for grant in order to accomplish its objective of gathering information and data before making final policy and spectrum determinatons regarding DBS service.

60. Several petitioners presume that the large number of applicants will use all or virtually all of the available spectrum, as well as the available capital. As a result, they state that any procedures used now will become permanent, and that there will be no spectrum left for later, regulated entrants, contrary to the supposition of the *Notice and Policy Statement*. Thus, they conclude that granting these applicants now would compromise the Commission's responsibility to determine the best use of the spectrum and to select the most qualified licensees.

61. Other petitioners remark that most of the current applicants are apparently in no hurry to initiate service and that most applicants have requested much broader authority than necessary for interim service. CBS states that only its proposal for high definition television service ("HDTV") using DBS serves the Commission's goal of experimentation.

62. CBS questions whether DBS will be able to compete successfully in the video marketplace, and Western submits a study that indicates that DBS can compete only if the various systems are technically compatible. Incompatibility will increase the cost per channel to the consumer, decrease the amount and the diversity of the programming available, and increase the risk to the system owners and to the investing consumer. According to Western, this represents inefficient use of the spectrum in terms of its value to the public.

63. *Discussion*—The Commission already has determined that the public interest will be served by the adoption of rules for DBS service. *See Notice and Policy Statement*, and DBS *Report and Order*. The existence of multiple applicants supports the value of this approach by introducing the potential for gathering even more significant information concerning the relative merits of various means of providing DBS service, and the

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[57] The Affiliates cite *Community Broadcasting Co. v. F.C.C.*, 274 F. 2d 753 (D.C. Cir., 1960), *Pike-Mo Broadcasting Co.*, 1 F.C.C. 2d 790 (1965), and other cases in support of their contention.

[58] The Affiliates cite *Midwest Television, Inc.*, 4 F.C.C. 2d 612 (1966), in support of their contention.

relative merits of a wider variety of technical designs and equipment.[59] The value of such information has already been established by the Commission in its previous orders in the DBS rule making proceeding.[60] No party has demonstrated that the Commission is prevented in any way from adopting regulations for existing and future DBS licensees based upon the information it gathers.[61]

64. All applicants are being required to proceed promptly in order to maintain the authority granted herein.[62] Any applicant who is not interested in the prompt implementation of its service will lose its authority. The necessity of authorizing entire nationwide systems despite an applicant's inability to proceed with its entire system at once is explained at paragraph 4, *supra*.

65. The Commission has already found that requiring technical compatibility for these proposals would not be desirable at this time.[63] The necessity for and nature of such compatibility standards are among the questions that will be resolved at RARC-83 or, if necessary, during this interim operational period.[64] Applicants have been advised that permanent rules will be adopted by this Commission after considering its initial experience with DBS service, and no reasons have been presented that demonstrate any impediment to the later imposition of such standards on existing DBS operators. Such action clearly is preferable to *a priori* adoption of system parameters without the benefit of operational experience.

G. Spectrum Allocation Issues

66. *Allegations*—The Affiliates and MST contend that no applications can be granted for DBS because no legitimate allocation decisions concerning the 12 GHz band have yet been made. They continue that a grant now would compromise the Commission's responsibility to determine the

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[59] Interm DBS operations clearly will be experimental in nature. Previous Commission decisions on DBS matters note the number of unanswered questions concerning several aspects of DBS service. DBSC also has submitted a list of unresolved issues, including the number of operators who can raise sufficient capital, the market demand for the various DBS services, the compatibility of receiver equipment, an identification of and accessibility to programmers, technical and service capacities and operating parameters, and band sharing potential. In this regard, we are cognizant of USSB's remark that "a month of experience is worth a year of hearings." *American Airlines, Inc.* v. *C.A.B.*, 399 F. 2d 624, 633 (D.C. Cir. 1966).

[60] DBS *Report and Order*, at paragraph 78 *et seq.*; *Notice and Policy Statement*, at paragraphs 19–24, 60 *et seq.*

[61] Several applicants specifically have noted that they knowingly are accepting the burden of whatever future regulation the Commision deems appropriate.

[62] *See* paragraph 123, *infra*.

[63] DBS *Report and Order*, at paragraphs 107 and 108.

[64] Sufficient lead time exists in the construction and launch schedule for a DBS satellite so that any conventions adopted at RARC-83 can be implemented by DBS licensees before the inauguration of service.

appropriate use of the spectrum before it has studied the terrestrial broadcasting, fixed satellite service ("FSS") and mobile service uses of the band. The Affiliates and Manufacturers assert specifically that little heed has been paid to the public interest in the service provided by 1,500 existing operational fixed microwave ("FS") operators or of the future growth needs of that service. The Utilities and Raytheon add that the DBS applicants have not demonstrated that their demands are superior to those of other 12 GHz users. They continue that there is nothing in the record to support the loss of terrestrial services for a "costly and superfluous" service for the 5% to 30% of U.S. households that have low levels of television service. They assert that this is particularly true in light of the Commission's recent elimination of the telephone/cable cross ownership restriction which will likely increase rural cable service. Furthermore, they state no survey or study shows the desire or the ability of rural residents to pay for the necessary equipment or the intention of any of the applicants to provide service to currently underserved areas.

67. The Manufacturers, the Affiliates, and Aerospace contend that before DBS service can be authorized for the 12 GHz band the Commission must make other determinations about spectrum availability and user needs. They assert that the Commission must consider, for example, on what basis, if any, existing terrestrial users can share 12 GHz with the satellites, what other spectrum is available for them, the relative suitability of available spectrum for various services and what transitional period is necessary for the relocation of existing services to avoid unreasonable operational or economic impact. NAB and the Affiliates contend that the large number of prospective operators before the Commission would occupy the entire portion of spectrum allocated to DBS, and that any commitment to DBS will be irreversible, completely foreclosing any other service for 12 GHz. NAB states that the *Notice and Policy Statement* promises an alternate spectrum to displaced operators, but fails to identify it. NAB and Raytheon maintain that no realistic alternative spectrum exists.[65] Aerospace and Raytheon remark that a majority of the applicants do not even recognize or address this issue, and Raytheon suggests that this renders those applicants incomplete.

68. Raytheon contends that the Commission cannot authorize a broadcasting service where it is shown that a wireline service will provide the same service, citing *General Mobile Radio Services*, 13 F.C.C. 1190 (1948). The Utilities state that peremptory authorization of DBS in the 12 GHz band would, in effect, favor luxury and convenience over the safety of life and property represented by FS services.

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[65] Raytheon cites paragraphs 28 and 29 of the *Notice and Policy Statement* as an alleged demonstration of the Commission's finding of the inadequacy of higher frequencies.

69. CBS contends that the Commission should be encouraging the development of HDTV, and that a grant of too many of the DBS applications, which propose standard service, would stall HDTV progress. It asserts that the public will not be served by the "redundant" service proposed by most of the applicants, whereas if the spectrum is given to HDTV it would result in a significant improvement in the quality of video service.[66] It stresses that HDTV needs incentives that can be provided only by dedicating the entire 12 GHz spectrum to multiple HDTV uses in order to encourage the commercial manufacture of equipment.

70. Graphic responds that the Commission's preference for DBS in the 12 GHz spectrum was established in the *Notice and Policy Statement*, and that no evidence has been offered concerning Graphic's application that would require the Commission to reconsider that determination. Also, Graphic indicates that the Commission should not reject an application on this basis.[67] VideoSat and DBSC list the number of ways in which their respective proposals will advance the public interest. VideoSat states that DBS service cannot be characterized as superfluous because the American public has demonstrated its desire for entertainment programs through its response to the commercial ratings services.

71. USSB contends that terrestrial television service from the 12 GHz band is infeasible, as signal coverage would be very limited.[68] It also contends that no hard evidence has been presented regarding an assessment of HDTV's future. USSB claims that it intends to pioneer "integrated" HDTV service, as stated in its application, and that there are reasonable and realistic alternates to HDTV in DBS service. It concludes that dedicating DBS service to HDTV would waste that potential, as the high cost of the service would result in minimal usage.

72. *Discussion*—Most of the issues raised by the petitioners regarding spectrum use and the future of FS services were resolved in the DBS *Report and Order*. In that decision the public benefits of the various FS services, as well as the spectrum needs of those services, were recognized and considered by the Commission, and those factors were weighed

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[66] CBS refers to the Commission's decision to develop FM radio service despite the bandwidth demands of that service, and contends that HDTV could revolutionize video service in the same way.

[67] Graphic claims that FS operators have no standing to raise issues concerning spectrum use because they have made no attempt to show harmful interference and consequent economic harm. Graphic maintains that the *Notice and Policy Statement*, at n. 27, found that microwave operations will not experience significant interference from DBS operations, although DBS receivers could suffer harmful interference from microwave signals. Futhermore, it contends that the *Notice and Policy Statement*, at paragraphs 4 and 29, states that the interm rules will not displace licensed microwave operators. The Commission concludes that the relocation of FS operators that eventually will result from this decision, along with its economic impact, gives FS operators a real interest in the DBS rule making and future dockets related to FS relocation.

[68] USSB cites a study published by A.D. Ring and Associates that demonstrates how the attenuation and propagation characteristics of a 12 GHz radio signal result in a limited reception range for a signal on that frequency.

against the various public benefits of DBS and the spectrum demands of that service. The Commission concluded that the greatest public benefit lay in the allocation of 12.2–12.7 GHz to DBS service.[69] A significant aspect of that determination was the Commission's conclusion that interim rules for DBS could permit DBS operation with minimal impact on FS services. Due to the construction and launch time involved in the initiation of DBS service, the Commission also found that conditional authorizations can be granted and construction begun before all the details of necessary accommodation are worked out.[70] The present number of DBS applicants does not affect this determination. Those applicants were not required to address the problem of accommodating other spectrum users. As indicated at footnote 70 above, that issue is the subject of another rule making proceeding.

73. Without determining the applicability of the *General Mobile* principles to broadcast allocations, it is clear that no wireline service presents a "feasible and practical alternative" to DBS service. Furthermore, our action does not favor luxury and convenience at the expense of public safety. Rather, it maximizes the accommodation of both services to the extent possible, given the available frerquencies.

74. Finally, the Commission already has considered reserving the 12 GHz spectrum for terrestrial HDTV service and has rejected that proposal.[71] No arguments are presented here that cause us to alter that conclusion. The Commission has determined that HDTV can be delivered by DBS. However, it specifically has declined to reserve the entire DBS band for HDTV because that would deprive the public of NTSC service in the DBS band.[72]

V. Petitions Filed Against Specific Applicants

A. DBSC and RCA Applications

75. *Allegations*—Oak questions the completeness of the applications of DBSC and RCA that propose to make capacity on their systems available to others, who in turn would provide program services to the public. Oak contends that these applicants do not propose to be "broadcasters" in that

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[69] The benefits of DBS service, catalogued in each of the orders in this proceeding, are not limited to the provision of service to the underserved areas of the country. *See, e.g.*, DBS *Report and Order*, at paragraphs 12–21.

[70] The Commission identified several potential frequency bands and allocation schemes to accommodate present and future FS and FSS services. DBS *Report and Order*, at paragraph 60 *et seq*. At the same time, the Commission ordered the initiation of a rule making to investigate and resolve those issues. *Id*. Petitioners have questioned the availability or suitability of those alternative spectrum for various reasons. Those comments demonstrate that some difficulties may be encountered. While these comments are appropriate in the rule making proceeding, they fail to demonstrate that no adequate accommodation can be made for FS services.

[71] DBS *Report and Order*, at paragraph 74.

[72] DBS *Report and Order*, (.$$,.886N

they do not intend to select or control the programming broadcast over their system, nor do they intend in all cases to provide the ground facilities needed for uplink transmissions. Oak states that these omissions require the Commission to consider the applications as incomplete . In reply, DBSC states that it intends to operate its DBS system as a common carrier, with programming being supplied by others. DBSC points out that this bifurcation of responsibilities is a well accepted method of providing programming in common carrier services such as the Multipoint Distribution Service.

76. *Discussion*—The Commission has maintained throughout the DBS rule making proceeding that DBS applicants would not be required to conform their proposed operations to one operational mode or regulatory classification. In particular, the DBS *Report and Order* states: "The imposition of an *a priori* classification would determine the nature of the service at the outset and thus would largely foreclose the possibility of gathering valuable experimental data." *Id.*, at para. 84. The *Report and Order* further notes that the Commission will gather important operational experience during this experimental stage. Thus, it was indicated that we could later "establish DBS as a permanent service according to traditional classifications, create a new classification as experience and public interest mandates indicate, or retain the existing open entry policy." *Id.* Under this policy, we find acceptable the proposals of DBSC and RCA to the extent that they intend to provide some DBS service in the common carrier mode.

B. VideoSat and USSB Applications

77. *Allegations*—In consolidated petitions to deny and comments, DBSC alleges that VideoSat and USSB do not propose to operate a direct satellite to home broadcasting service.[73] Rather, they propose to transmit programming primarily to broadcasters, cable operators, and community antenna operators for local retransmission to individual homes. For example, DBSC states that USSB would provide exclusive satellite transmissions to member stations in every television market. The member stations then would retransmit the signal to individual homes, but direct broadcast service to individual homes would be offered only in areas without terrestrial television service. Thus, DBSC alleges that USSB would provide direct satellite to home broadcasting to only approximately one percent of the nation. Further, DBSC contends that VideoSat simil-

[73] DBSC also notes several additional matters that it considers relevant if the Commission makes a comparative choice on the qualifications of these applicants. However, because no question of mutual exclusivity is present at this stage of application processing, these comments are not relevant herein. Likewise, the comments of the Hispanic Bar Association concerning the relative merits of these proposals are not considered herein.

ary proposes to utilize a network of affiliated terrestrial stations to rebroadcast programming. According to DBSC, the last priority of these two applicants is to provide direct satellite to home service.

78. DBSC asserts that failure to provide direct satellite to home service contravenes the Commission's intent in allocating spectrum for DBS use. Indeed, DBSC states that in the *Report on Policies for Regulation of Direct Broadcast Satellites, supra,* at page 7, the Commission's staff correctly recognized that such service would be provided "for residences." In addition, DBSC maintains that the ITU definition of the broadcasting satellite service also establishes its primary use for individual household reception. For these reasons, DBSC states that VideoSat and USSB would waste valuable DBS spectrum, and that their proposed service could be performed more efficiently and less expensively over terrestrial broadcasting facilities or through the fixed satellite service.[74]

79. In its opposition to DBSC's petition to deny, VideoSat contends that its primary commitment is to provide direct satellite to home service to areas that currently are unserved or underserved by existing facilities. In addition, it contends that its proposal would make additional programming available to terrestrial television stations and cable systems in adequately served areas. VideoSat states that it does not propose to serve only terrestrial broadcasters but rather to augment its DBS service by allowing terrestrial broadcast stations to receive and rebroadcast one of its proposed two channel services. VideoSat contends that its application proposes a new "free" advertising supported DBS service that would be available to unserved and underserved areas throughout the United States, including Hawaii and Alaska, and that it is the only programmer proposing service to Puerto Rico. Moreover, VideoSat states that in the second phase of its proposed system, it would activate a channel that would be used exclusively for direct satellite to home service and would be programmed by individual non-profit, educational and public interest groups on a first-come, first-served basis.

80. In its opposition, USSB states that its application proposes direct broadcast service with reception by both individual and community antennae and terrestrial stations. USSB further states that the primary purpose of its proposed DBS system is to broadcast television programming to as many American homes as possible. Moreover, USSB alleges that its proposal includes terrestrial television stations: (1) to provide audience development, especially where there might be interference from terrestrial microwave users or where individuals have not been able to buy or install DBS receiving equipment; (2) to help strengthen television

[74] DBSC suggests that, rather than dismissing these applications with prejudice, the Commission could treat them as requests for authorization to use transmission capacity in the fixed satellite service.

member stations by providing them with first-rate programming; and (3) to allow member stations to operate as news bureaus, production facilities and program sources for USSB. Thus, community reception, according to USSB, is envisioned as an important, complementary but in no way exclusive, delivery mechanism.[75]

81. USSB further maintains that even if individual reception were not the dominant delivery mode, its proposal still would be clearly within the contemplated scope of DBS service. In support of its position, USSB states that the term "direct reception" contained in the 1977 WARC definition of broadcast satellite service includes both individual reception and community reception, and that either delivery mode is permissible under international radio regulations. Indeed, USSB states that combining both modes in its system is particularly efficient because it offers the possibility of sharing the spectrum with the terrestrial fixed service users. USSB asserts that community receiving antennae can be coordinated with terrestrial fixed systems because: (1) a few community receive antennae can serve an entire urban area; (2) it is inexpensive to build improvements in community antennae to minimize interference from co-channel terrestrial systems; and (3) they can be strategically located to avoid interference. Thus, according to USSB, both community and individual reception modes as proposed would offer the most efficient use of the 12 GHz band by permitting sharing with terrestrial fixed service users.

82. *Discussion*—The Commission consistently has considered regulatory flexibility to be an important aspect of the early implementation of DBS systems. Accordingly, upon adoption of the *Notice and Policy Statement*, we specifically sought applications with differing service proposals and stated: "We feel that the public interest will be best served by a regulatory policy that is flexible enough to allow for different system approaches in the interim period." *Id.*, at para. 95. We do not believe that the proposals by applicants to provide DBS service using intermediary reception devices are outside the intended scope of the policies outlined throughout the DBS rule making proceeding. In addition, we note that these plans fall within the definition of BSS (DBS) adopted at the 1979 World Administrative Radio Conference, and included in planning documents for the RARC-83. Specifically, these documents define direct broadcast satellite service so as to included "community reception," and direct that "planning shall be based on individual reception, but each administration may use the reception system which best meets its re-

[75] Contrary to DBSC's assertion, USSB states that its programming will not be scrambled, and denies that it alleged that scrambling a DBS signal would provide protection from interference by terrestrial microwave users.

quirements (individual or community reception, or both)."[76] Accordingly, we find that the community reception proposals of these applicants are consistent with the domestic policy expressed in our DBS rule making proceeding, and consistent with both the existing international prescriptions and U.S. policy positions relative to the upcoming RARC-83 negotiations.

VI. Technical Qualifications

A. Technical Descriptions

83. *CBS*—CBS proposes to build and operate a high definition satellite system ("HDTV").[77] The completed system proposed by CBS would consist of four satellites, one per time zone. CBS requests that each satellite be authorized to transmit three channels of HDTV at 400 watts of power per transponder, providing an EIRP of 60–65 dBW. While CBS seeks four orbital locations, one to serve each of the four areas, it does not request specific orbital locations or frequencies in light of the fact that these matters will not be settled until after RARC-83. CBS proposes to use shaped beam satellite transmitting antennae. The antenna pattern from each satellite would be shaped to fit the service area contours to enhance signal strength and to minimize spillover into adjacent territories. CBS proposes to use one or two in-orbit spares in addition to the four operating satellites when the system is fully operational.

84. CBS' satellite transmissions could be received by both individual home reception and community reception antenna systems. CBS states that the community reception type systems may employ antennae larger than one meter in diameter and be located near local television stations and cable head ends. The individual reception systems are expected to employ antennae of approximatey one meter in diameter. The outdoor receive antenna unit would be connected to the indoor receiver system by a coaxial cable. The indoor system would demodulate, descramble, remodulate and reformat the receive signal to allow video-audio display. Homes without HDTV receivers could convert the signal for conventional reception with special equipment. In homes equipped with HDTV receivers, no conversion would be required. CBS expects the HDTV receivers to be available by the time the satellite system is put into operation, despite the need for considerable set design development.

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[76] WARC-1979 Resolution Number 701, "resolves" 5. This provision was included in Resolution Number 865 of the ITU Administrative Council establishing the agenda for RARC-83.

[77] Initially, CBS filed comments in the DBS general docket suggesting that the 12 GHz band be reserved for terrestrial HDTV, and opposed acceptance of applications for interim DBS authority. However, CBS asserts that it filed such an application at this time to ensure that serious consideration would be given to introducing HDTV in the 12 GHz spectrum.

85. The up-link facility would include both the broadcast and space craft control facilities. CBS indicates that the broadcast production facility would originate HDTV programming in most cases. The control facility would provide the telemetry, tracking and command functions of all the operating satellites. CBS states that all of the satellite channel transmissions would be scrambled.

86. CBS indicates that its parameters would conform to any system design and signal encoding and modulation methods adopted by the Commission after RARC-83. While CBS did not specify the orbital locations for the four satellites serving the four service areas, CBS indicates that it expects the Commission, subsequent to RARC-83, to accommodate as many DBS systems as possible in each orbital location. In regard to channel assignments, CBS states that its satellite transponder would be designed to transmit on practically any three center frequencies in the 12.2–12.7 GHz band and to receive on any three center frequencies in the 17.3–18.1 GHz band.[78] However, CBS states that its spacecraft construction schedule will be able to accommodate any final allocation of frequencies after RARC-83, as long as they are consistent with the HDTV signal modulation parameters and bandwidth requirements.

87. *DBSC*—DBSC proposes to employ three operational satellites, one each in three service zones. Each satellite would use six primary channels and eight beam channels. DBSC states that the same set of spot beam channels could be used on each satellite. However, because of the overlap of the zone beams serving adjacent zone areas, DBSC contends that a different set of six zone beam channels must be used in zones that are contiguous. Together, these service zones include the entire contiguous United States (CONUS). According to DBSC, this would require a total of twenty distinct down-link channels. This system also would provide spot coverage to two smaller areas within each zone, each spot covering about 10 percent of the geographic area of the zone. Each spot would provide up to four additional television channels. These spot coverage locations would be designed to be movable, and would be used to provide service outside the CONUS, *e.g.*, to Alaska and Hawaii. The first phase of the DBSC system involves one satellite. The second satellite would be stationed to the west of the first satellite.[79] DBSC states that its chosen orbital locations would permit it to serve most of the CONUS utilizing

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[78] To accommodate HDTV, CBS proposes that the Commission assign it channel bandwidths of 27 MHz.

[79] DBSC requested satellite orbit locations at 103 degrees W. longitude, 123 degrees W. longitude, and 143 degrees W. longitude for the three operational satellites, with the initial operational satellite to be located at 103 degrees W. longitude. The spare satellite would be co-located with the operational satellite serving the central service zone at 123.05 degrees W. longitude. However, as noted, *supra*, orbital locations will not be assigned until the RARC-83 conference matters have been completed.

elevation angles in excess of 30 degrees. DBSC notes that the requested orbital positions are approximatey 15 degrees longitude west of the western boundaries of the service area zones. Thus, the satellite solar eclipses in most cases would begin after midnight for viewers. Each satellite would have approximately 1360 watts of transmitter power provided by six 200 watt transmitters and individual 20 watt transmitters for each of the two steerable spot beams. DBSC states that their satellites were designed for launch compatibility with the NASA space shuttle, Atlas-Centaur or Ariane launch vehicles.

88. Broadcast signals would be transmitted directly from the satellites to small receiving antennae that typically will be mounted on the rooftops of residences and other buildings. DBSC's signals also may be received by community antennae. DBSC states that its discussions with potential equipment manufacturers suggest that the equipment cost for the home viewer will be approximately $250, not including installation. DBSC proposes ground up-link facilities from two fixed earth station facilities, and co-located telemetry command and ranging facilities. The two permanent uplink facility locations are to be determined at a later time. In addition, DBSC plans to provide mobile uplink facilities to allow greater flexibility to its programmer customers.

89. *Graphic Scanning Corporation*—The DBS system that Graphic proposes would consist of two operating satellites. Each of the Graphic satellites would have two 300-watt transponders. This power would be achieved by parallelling two 150-watt traveling wave tube amplifiers. Graphic estimates that this transponder power would provide a maximum EIRP of 56.7 dBW at the center of the footprint and a minimum EIRP of 53.7 dBW over the proposed coverage areas. Graphic states that this would allow the majority of home receiving antennae to be 0.6 to 1.0 meters in size depending on location.

90. Graphic proposes to station its initial satellite[80] at 143° W longitude for coverage of the western CONUS and to station its second satellite at 115° W longitude for coverage of the eastern CONUS. An in-orbit spare satellite would provide back-up service for either its western or eastern operational satellites. Ground up-link feeder transmissions would be in the 17 GHz band, after further specifications are determined at RARC-83. The up-link ground station, at a yet-to-be determined location, is where program origination and telemetry, tracking and control (TT&C) facilities would be combined. Up-link programming and TT&C facilities would use a 17 GHz assignment and the downlink would employ the 12 GHz band in accordance with RARC-83. However, during transfer

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[80] The applicant has been assured by two satellite manufacturers that sufficient primary power of two kilowatts or more is now available from either spin-stabilized or body-stabilized spacecraft and that the applicant's two-channel, half-CONUS proposal is feasible.

orbit maneuvers, 4 and 6 GHz bands would be used for TT&C operations. The applicant states that large, steerable, dual band antennae would be used at the ground facility and that characteristics would be compatible with the satellite G/T specification, positioning, and pointing accuracies. According to Graphic, the ground segment antenna would be 11 meters or larger and would be located in the western desert where the elevation angle is high and the probability of exceeding rainfall attenuation beyond the up-link margin is low. Up-link transmitter power would be 200 watts or more. Downlink signal characteristics of the composite video and signal transmitted by the satellite would be governed by the size and cost of home receivers.

91. The majority of home receiver antennae would range in size from 0.6 to 1.0 meter in diameter. The exact size would be dependent upon the location of the subscriber within the footprint and local signal attenuation conditions. Home receiver equipment would consist of a parabolic antenna, a down-converter, and a signal selector/processor. The applicant indicates that closed-captioning data would be extractable after descrambling and conversion to VSB AM. It also points out that conventional auxiliary detection equipment could be used for the purpose of closed-captioning.

92. *RCA*—RCA proposes a DBS system consisting of six satellites: four in-orbit operational satellites, one in-orbit spare, and one ground spare. The basic arrangement would consist of the four operating satellites, each providing service to a single time zone. The four in-oribt operational satellites would be controlled by an up-link transmitter in the region served by each satellite.[81] RCA plans to use satellites that are expected to operate at least seven years and generate prime DC power of aproximately 3,600 watts at end of life (approximately 4,770 watts at beginning of life). Each satellite would have six 230-watt transponders. For each transponder, RCA is specifying a channel bandwidth of 24 MHz for regular program service. However, two of the six transponders would offer the option of wideband operation. By ground command, either of the two would be capable of switching from regular 24 MHz service to 72 MHz in order to accommodate such experimental service as high definition television (HDTV) or other entertainment, information, or educational programs. In addition, RCA's satellite would be able to provide two high quality program audio signals to permit transmission of stereophonic

[81] RCA seeks to position its satellites assigned to cover the Eastern time zone at 95°–125° W longitude, its Central time zone satellite at 110°–140° W longitude, its Mountain time zone satellite at 125°–155° W longitude, and its Pacific time zone satellite at 140°–170° W longitude. These orbital locations are preferred in order to permit an average 20° elevation for receive antennae and to minimize the effect of service interrruption during eclipse conditions. Moreover, according to RCA, this flexibility will enable the United States to negotiate freely at RARC-83 with respect to the issue of satellite orbital positions.

music and audio programs. RCA anticipates that most installations of home receive stations would consist of an antenna with a diameter in the range of 0.6 to 1.0 meter with corresonding net gains of 34.5 to 38.3 dB, respectively. However, RCA does not propose to provide these receive earth stations as part of an integrated service.

93. RCA intends to provide only the space segment of the DBS system, including telemetry, tracking, and command (TT&C) facilities for the operation of these satellites from its ground facilities at South Mountain, California. Ground control of each spacecraft would be accomplished from the South Mountain TT&C station utilizing C-band frequencies (4/6 GHz) for both launch and in-orbit operations. Three of the four operating satellites would be capable of receiving transmissions originating from anywhere within the CONUS. Up-link programming service would be transmitted from several groundsites throughout the United States using the 17.3–17.8 GHz band. RCA indicates that up-link facilities would be provided only at a customer's request and RCA expects that most of the up-link facilities will be customer-owned. RCA asserts its system has been designed with sufficient flexibility to permit each of its proposed satellites to be positioned over a 30 degree arc, *i.e.*, ± 15 degrees about a central longitudinal position. Thus, each satellite could be relocated as much as 15 degrees from an initial, interim orbital slot.

94. *USSB*—USSB proposes an initial system consisting of two operational satellites positioned at 115 and 135 degrees west longitude in the geostationary satellite orbit. From these positions, each satellite would provide coverage to service areas approximating two time zones in two separate antenna beams. The eastern satellite would serve the Eastern and Central time zones, and the western satellite would serve the Mountain and Pacific time zones. Each beam would carry three television channels, and associated subcarriers on each channel for program audio, stereo or a second language, and special services and control functions. USSB also proposes to launch a third satellite as an in-orbit spare. All of its system satellites would be capable of functioning as either a western or eastern operational satellite by ground command. USSB proposes to make satellite transmission in the 12.2–12.7 GHz band. The Effective Isotropic Radiated Power (EIRP) expected is aproximately 57 dBW. The ground up-link feeder station would operate in the 17.3–18.1 GHz band. USSB proposes antennae diameters of 0.75 meters for individual home reception, and 2.3 meters for community-reception.

95. USSB proposes satellites of the PAM-A Space Shuttle or Ariane launch spacecraft type. Each television channel would be powerered by a traveling wave tube amplifier ("TWTA") with a beginning-of-life power of about 230 watts. Full TWTA redundacy would be provided, resulting in a total of 12 high-power TWTA's per satellite. In addition USSB indicates that each satellite would provide a service channel, switchable between

the two beams for transmitting and employing either these same time zone beams for receiving, or a CONUS-wide beam for receiving. Up-link antenna patterns would be shaped both to maximize the power radiated over the intended service areas and to minimize signals reaching other portions of the U.S. and foreign countries.

96. USSB noted its intention to request additional satellites so as to provide one satellite for each time zone.[82] Following the launch and orbit position of the first satellite in the second phase, one of the initial satellites would be switched by ground control to serve only a single time zone. Thus, following the launch of the first satellite of the second phase, each of the two satellites would serve one time zone. USSB states that a feeder-up-link station would be located in the Minneapolis-St. Paul, Minnesota, area. This station would perform the telemetry, tracking, and command functions for all of its satellites in orbit, and feed programming to all of its satellites. USSB also intends to develop and implement HDTV in a manner which would permit reception by conventional as well as HDTV home receiver sets.

97. *VideoSat*—VideoSat proposes to implement a DBS system in two phases. The first phase would utilize two HS–376 type satellites, and the second phase would utilize two additional satellites. VideoSat proposes to position the first two satellites at 115 degrees and 135 degrees West longitude, and the two additional satellites at 155 degrees and 175 degrees West longitude. In addition to its operational satellites, VideoSat plans one ground spare. VideoSat proposes in the first phase to distribute one video channel of service per zone to all 50 States, and Puerto Rico. In addition, one low power channel (2 watt) transponder is planned for each satellite for inter-studio video relay. VideoSat proposes to cover both the Central zone and the Eastern zone with the same satellite from 115 degrees West longitude. The Pacific and Mountain zones would be covered with another satellite from 135 degrees West longitude. The satellites would be arranged to simultaneously transmit right-hand circular polarization toward the serving area to the east, and left-hand circular polarization toward the serving area to the west. Under VideoSat's proposed second phase, two new satellites would be placed in orbit at 155 degrees and 175 degrees West longitude. Two high power transponders on the satellite positioned at 115 degrees West longitude would be switched to right-hand circular polarization serving the Eastern zone.

98. The satellites proposed by VideoSat would be designed to have a life of 8 years for the intended purpose of providing DBS service. The satellite launch vehicle would be the STS/PAM-D or Ariane. VideoSat states that its proposed satellites would maintain their station, keeping within ± 0.1

[82] USSB proposes that its two initial satellites be positioned at 115 degrees and 135 degrees W. longitude.

degree in both north-south and east-west directions. The satellites would provide an end of life power of 1000 watts. According to VideoSat's application, up-link stations would be provided at Naples, Florida, and Los Angeles, California. VideoSat also would provide mobile up-link facilities that would allow live program origination from remote locations. VideoSat would utilize the 17 GHz band for up-link transmissions. VideoSat proposes that EIRP levels from the satellites would be a minimum of 54 dBW with 110 watt traveling wave tube output power. VideoSat is recommending that 0.9 meter diameter receive antennae be used in most areas. VideoSat expects its satellite's mission life to be 8 years minimum.

99. *Western Union*—When fully implemented, Western Union's proposed system would consist of four satellites,[83] each with four transponders, capable of serving the contiguous United States, Hawaii, Alaska, Puerto Rico, and the Virgin Islands. Two in-orbit backup satelites are also proposed. Under the first phase of its proposed system, one satellite would be positioned at 100° W longitude in order to provide service to the Eastern and Central time zones, Puerto Rico and the Virgin Islands. Another satellite would be positioned at 120° W longitude in order to provide service to the Mountain and Pacific time zones and to provide service by spot beams to Alaska. As the service matures, two additional satellites would be positioned at 80° W longitude and 140° W longitude. When these latter satellites become operational, each of the four satellites would provide service to a different time zone, with the one positioned at 80° W longitude serving Puerto Rico and the Virgin Islands in addition to the Eastern time zone and with another positioned at 140° W longitude serving Alaska and Hawaii in addition to the Pacific time zone. However, Western Union indicates that its system would be flexible, depending upon the demands of its customers, to allow allocation of transponders between time zones. Accordingly, each satellite would be able to transmit four programs to two service areas in any combination, switchable by ground command. Its back-up satellites would also be positioned at 80° and 140° W longitude.

100. The initial system would have four downlink video channels, each 18 MHz wide with center frequency spacings of 40 MHz or greater. Each video channel would be FM modulated and contain up to three audio subcarriers. According to Western Union, one or more of the four channels can be made wider than 18 MHz to provide high definition television (HDTV) if regulatory or market conditions require but, at this time, HDTV is not planned for the initial configuration. Up-link transmissions would originate from a master station at Phoenix, Arizona, where its telemetry, tracking, and command facilities would be located. Up-link

[83] Western Union states that the satellites would be designed to be compatible with either STS (Shuttle), Delta 3920/PAM or Ariane launch vehicles and would have a mission life of seven years.

transmissions would be in the 17.3 to 18.1 GHz band and downlink transmissions in the 12.2 to 12.7 GHz band in accordance with the results of RARC-83. The telemetry, tracking and control subsystem would use frequencies in both the C-band and Ku-band.

101. The home receive equipment necessary for reception would consist of an outdoor unit (roof antenna with a downconverter electronics), indoor unit (remodulator electronics, decoder/billing box), and normal VHF/UHF television set with antenna. Home antenna size is expected to range from 0.4 to 0.9 meter. In addition, the home receive equipment would allow for the insertion of local broadcast programming and advertising if required by a program supplier. Although the system would be designed specifically for "community" or multi-residential service, larger receiving earth stations would facilitate the improved signal-to-noise reception suitable for further distribution.

B. Discussion and Authorization Conditions

102. The *Report and Order* stipulated that DBS applicants are required to conform to the technical guidelines specified in the WARC-77 Final Acts. Furthermore, all interim authorizations will be subject to modification, as the Commission deems necessary, in order to comport with determinations made at RARC-83.[84] Deviations from the parameters adopted at RARC-83 may be permitted with Commission approval, provided they do not cause interference to operational or planned systems of other administrations in excess of that specified in the Final Acts of WARC-77 or RARC-83. In addition, the Commission stated in the *Report and Order* that while it intended to take each applicant's request fully into account, the Commission would, where appropriate, restrict the number of channels assigned to any applicant, limit or modify the area to be served, or impose any other conditions it deems necessary when acting upon a particular application. Under the conditions specified below, we believe that the applications submitted by CBS, DBSC, Graphic, RCA, USSB, VideoSat and Western Union generally are consistent with the technical parameters adopted for Region 2 in the Final Acts of WARC-77, and with Commission policy to maximize use of available spectrum. Further, they contain sufficient flexibility to accommodate any likely outcome of the 1983 RARC.

103. The Final Acts of WARC-77/79 recommended an 18 MHz bandwidth for Region 2 individual reception systems. Based on preparations currently underway for the 1983 RARC, it now appears that a wider bandwidth may be used for planning purposes. Furthermore, the United

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[84] Until the Conference has adopted a Plan for Region 2 and has prescribed technical parameters, it will not be possible to establish the specific portions of the usable orbital arc that will be assignable to particular systems, or to determine the precise system parameters that will be authorized.

States currently is attempting to develop a planning approach for the 1983 RARC that would give administrations the flexibility to implement systems employing a variety of channel bandwidths (*e.g.*, for HDTV). Accordingly, it would appear that the applicants' various choices of bandwidths primarily in the range of 18 MHz to 24 MHz are compatible with the likely outcome of RARC-83.[85] We note, however, that one applicant, CBS, proposed a channel bandwidth of 27 MHz for HDTV, a significant variance from the other bandwidths discussed above. CBS indicates that the need for a 27 MHz or greater bandwidth for HDTV is provisional and that further studies in this area are being undertaken. Based on preparations for the 1983 RARC, it now appears that wider bandwidths may be necessary to transmit HDTV signals. For example, recent discussions in the FCC RARC Advisory Committee indicate that HDTV could be provided by combining 2 conventional (18–24 MHz) DBS channels. While we wish to encourage the development of HDTV services, we are concerned that such services utilize efficient transmission schemes. Accordingly, we tentatively will approve CBS's HDTV satellite system subject to the conditions that additional channel bandwidth will be assigned subject to a sufficient showing of need and adequate spectrum availability.[86]

104. DBSC is the only applicant that proposes to divide the CONUS into three service areas. However, the United States' preparations for the 1983 RARC are attempting to provide sufficient flexibility to allow implementation of both three and four service area systems. Furthermore, DBSC initially would serve the eastern section of the U.S. This area is approximately the same size under both a three and four service area system. Accordingly, we believe that DBSC's initial system is likely to be compatible with the outcome of RARC-83 in terms of service area. Graphic proposes to divide the CONUS into two service areas. Similarly, USSB, VideoSat and Western Union propose an initial system with two satellites. Each satellite would serve two adjacent time zones. The current U.S. proposals for RARC-83 would divide the CONUS into four service areas approximating the U.S. time zones. However, the U.S. will likely request that any plan developed at RARC-83 have sufficient flexibility to allow adjacent service areas to be served from a single orbital position. This would permit, for example, using a single satellite to serve the Eastern and Central time zone service areas. Because these pro-

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[85] We will allow applicants an opportunity to amend their applications to utilize the channel bandwidth eventually adopted at the 1983 RARC, if they so desire. Also, their modifications may pertain to all other relative technical matters, including the specific parameters of requests for satellite feeder uplink station facilities.

[86] While CBS is the only applicant that proposes to provide HDTV service on a regular basis, several other applicants indicate a willingness or intention to experiment with HDTV transmissions. Pending the outcome of RARC-83, the Commission will permit such HDTV experiments on a secondary basis.

posals would use two service areas with each one encompassing two adjacent time zones, it would appear that these systems would be compatible with the U.S. desired outcome of RARC-83. However, all of the applicants are cautioned that if the plan adopted at RARC-83 does not contain this flexibility, the systems will have to be modified to comply with the service area requirements adopted at RARC-83.

105. In its application, DBSC requests a total of 20 transmit channels. Each DBSC satellite would use six channels for its three zone beams and eight channels for its spot beams. DBSC states that an additional set of six frequencies is needed to serve adjacent service areas due to the overlap of these beams. We believe that the plan developed at the 1983 RARC will contain sufficient satellite spacing to allow full frequency re-use between satellites serving adjacent service areas. If so, we will not assign DBSC an additional six channels to serve adjacent service areas, *i.e.*, all satellites will be assigned the same six zone channels. DBSC also proposes to utilize spot beam channels. This raises the question of efficient spectrum utilization. The use of a channel for a spot beam effectively prevents that channel from being used for larger area coverage. While we will permit spot beam coverage, the assignment of frequencies for spot beam coverage will be subject to sufficient spectrum availability. Further, we will require frequency re-use within DBSC's two spot beam clusters, *i.e.*, the same four channels must be re-used within the two antenna spot beams.

106. In addition to its three DBS channels, USSB proposes to utilize a low power service channel. This service channel would employ a 20 watt TWTA for the transmission of programming material originating at member TV stations. USSB states that in the second phase of its system, this channel may be used for high power transmissions to individual homes. VideoSat also proposes to use a low power (12 watt) channel for interstudio relays and telephone communications. We believe that such uses of a low power service channel raise significant questions of spectrum efficiency. Use of a dedicated low power channel for program distribution, interstudio relays or telephone conversations effectively eliminates the use of that channel for DBS operations. Furthermore, we believe that such a use of a channel is more appropriate in the fixed-satellite service than in the broadcasting satellite service. Accordingly, we will not assign USSB or VideoSat additional channels for such uses. However, as stated in paragraph 4, *supra*, the Commission will consider specific requests to make secondary use of transmission capacity in some circumstances, *e.g.*, during hours when channels are not being used to delivery programming to homes.

107. In summary, given the above conditions, we believe that the subject applicant system parameters generally are consistent with existing and anticipated international agreements and reasonable domestic

spectrum management policy. Also, these individual applications appear flexible enough to accommodate any likely outcome of RARC-83 and subsequent rules or technical standards of the Commission. However, as previously noted, these interim grants are made without assigning specific channels, orbital positions, antenna patterns, signal antenna polarization, effective radiated power and corresponding received power flux density, service areas, or channel bandwidth, or precise system parameters.

VII. Financial Qualifications

A. Financial Plans of Applicants

108. *VideoSat*—VideoSat's financial information indicates that total costs under Phase I of its operation (1982–1985) would be approximately $232.1 million with expenditures of $40.7 million for 1982–1983, $70.1 million for 1983–1984, and $121.3 million for 1984–1985.[87] VideoSat plans to meet these costs from proceeds of approximatey $166 million from the sale of common stock and $70 million from long-term debt financing. VSS estimates proceeds from the sale of the common stock each year as follows: 1982–1983—$41 million; 1983–1984—$71 million; 1984–1985—$54 million. The long-term debt financing would be incurred in the first half of 1985 at an estimated interest rate of 15% per annum for a term of five years with a semiannual payment of principal of $7 million plus interest. VideoSat projects a net income of $2 million in the first year the system becomes functional, 1985–1986, and annual net income of $12.1 million by 1994–1995. The financial projections of VideoSat are based on Phase I requirements, *i.e.*, those costs associated with the operation of two satellites, each providing one channel of programming to each of the four CONUS time zones. These projections do not include Phase II which would consist of four operating satellites each one serving a different time zone. Such projections are not provided because the actual timing of Phase II is indefinite and dependent upon the success of Phase I during a reasonable period of actual operations.

109. *DBSC*—DBSC estimates that the total cost of its system would be approximately $577 million, consisting of space segment costs of approximatey $533 million and ground segment costs of approximatey $44 million. DBSC anticipates that preoperating costs would be approximatey $37 million and that operating costs for the first year in which all four satellites are in service would be approximately $111 million. DBSC estimates that the average projected unit cost for the DBSC spacecraft would be approximatey $78 million including incentive payments of $45

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[87] For 1981–1982, VideoSat indicates Phase I start up costs of $0.4 million that would be more than offset by $0.5 million obtained through issuance of preferred stock.

million for each launch, and $37 million for insurance related to the space segment. It estimates capital costs of $44 million for ground segment components. In the first year of operation of the total system, DBSC projects earnings before taxes of $117.7 million. DBSC points out that interim financing has been arranged through the provision of various professional services to DBSC on a credit basis, as well as a small amount of cash advanced by the principal stockholders. It adds that longer term financing, debt and equity, as well program funds, are matters under continuing discussion with various financial and venture capital institutions. DBSC anticipates little difficulty in raising funds, as required, upon grant of authorization to construct and operate the system.

110. *Graphic.* As evidence of its financial capability, Graphic has submitted a consolidated condensed balance sheet as of March 31, 1981, which shows current assets of approximatey $37 million and other assets of approximatey $46 million, current liabilities of approximately $13 million, long-term liabilities of approximatey $28 million, and shareholders' equity of approximately $40 million. Graphic also has submitted a consolidated condensed statement of earnings for the nine months ending March 31, 1981, which shows total revenues of approximately $45 million and net earnings of approximately $10 million. In addition, Graphic submitted a letter from an investment banker who has undertaken two major financing projects involving Graphic and who, in April, 1980, underwrote the issuance of $25 million in convertible debentures and, in April, 1981, 615 thousand shares of Graphic's common stock. In this letter, Graphic's investment banker indicates: that Grarphic is currently conservatively capitalized with a significant percentage of its assets represented by cash and marketable securities; that the current market value of Graphic's common stock on a fully diluted basis is very close to $300 million; and that Graphic's financial requirements for the proposed service can be readily met over the next several years through cash on hand, internally generated funds, bank borrowings, and the issuance of debt, equity or equity-related debt securities to the public and/or private investors.

111. Noting several difficulties inherent in making accurate estimates in this area, Graphic chose not to rely on revenues in estimating its financial requirements through the first year of operation. Using 1981 dollar values, Graphic estimated that $136 million would be required to finance its proposed system through the first year, including capital, start-up and operating costs. Graphic expects to incur $94 million in costs related to spacecraft development, purchase, management, launch and insurance, $10 million in costs to construct control center and programming facilities, and $4 million in receiver development and production. Operation costs for the first year are estimated at $28 million.

112. *Western Union.* Western Union estimates that its initial two satellite phase will cost approximately $161.7 million and that deployment of

the additional two operating satellites and two in-orbit spares will cost approximatey $288.6, for an overall total investment of $450.3 million. Revenue requirements are estimated at $7.2 million per transponder for the initial two satellite phase, $12.5 million per transponder for the subsequent four satellite phase, and $9.8 million per transponder for its overall DBS system. Payment for construction and launch costs would be made principally from funds generated internally or from available lines of credit and loans.

113. *RCA*. RCA indicates that the DBS system would be another product line segment in RCA Americom's organizational structure, and that common staff functions such as purchasing, financial and engineering would be adjusted to support the new enterprise. RCA estimates the cost of its system as follows: space capital costs of $359 million to purchase three satellites and launch two in the Eastern time zone, including spacecraft hardware, launch vehicles, launch mission operations, launch insurance and engineering support that will be expended in the three year period preceding system operation; ground capital costs of $14 million; and operating costs of $1 million the first year, increasing to $14 million in the fourth year when the system becomes operational. Revenue would be derived from lease of the six television channels to programmers and the rate for the lease of each one would be approximatey $30 million per year. However, after the four time zone system becomes operational, the rate per television channel might be reduced to $20 million. RCA states that while the space segment charge for a television channel in all of the four time zone satellites is high (approximately $60-80 million per year), the cost to the user per receiver household would be about $1.33 per month, assuming five million receiver households.

114. *USSB*. With respect to its financial qualifications, USSB has provided information relative to the cost of its proposed undertaking. USSB states that alternative means of obtaining suitable spacecraft are being evaluated, including the leasing of satellite capacity from a separate entity that would finance the procurement and launch of the proposed system's required spacecraft. USSB states that use of the leasing mechanism would allow it to incur the costs of satellite use during the period of operations when such expenses can be offset by expected revenue.

115. While other financing approaches will be considered and evaluated, the financial information provided by USSB is based on the lease alternative. Under this proposal USSB estimates that preoperating cash requirements will include $26.4 million for terrestrial feeder links and studio/production equipment, $71.6 million for purchase and development of programming at the start of operations, and $35.5 million for administrative and start-up cash requirements. Operating cash requirements will include the major expense of procurement of programming, estimated at $646.8 million for the first broadcast year, advertising and market-

ing costs of $49.4 million, salaries, benefits and travel costs of $33.6 million and debt repayment and interest costs of $43.8 million. In addition, the projected cost of the satellite lease is estimated at $62.6 million annually.

116. USSB states that $133.5 million in preoperating cash requirements will be needed. USSB indicates that initial discussions with underwriters and financial institutions suggest that necessary sums can be raised. USSB expects to realize advertising revenues of $840.9 million during its first year of operations and, indicates that, if this advertising revenue is received in a timely fashion, it is likely that its anticipated full line of credit will not be necessary.

117. *CBS*. CBS refers to its publicly available financial statements to establish its ability to construct its proposed DBS system. The CBS balance sheet, as of December 31, 1981, indicates current assets of $1.5 billion as against current liabilities of $800 million, and total assets of $2.4 billion as against total liabilities of $1.2 billion.

B. Discussion

118. In the *Report and Order* authorizing the DBS service, the Commission indicated that it would not require stringent financial qualifications showings or subject such applicant showings to detailed analysis. Rather, the Commission would impose on each permittee an obligation to undertake the construction of their respective systems with due diligence. For this phase of the proceeding, due diligence would be the construction of the required space craft, or completion of contracting for such construction within one year of the date of grant.

119. Although we do not require stringent financial showings of DBS applicants, *see Report and Order*, at paragraph 114, we note that one applicant, CBS, has not supplied any cost estimates for instituting the first phase of its proposed system. Although the financing of this applicant appears adequate to underwrite some reasonable cost estimate, we shall require it within 60 days of the release of this *Order* to supplement its application to include such estimate. Our grant herein of its application is conditioned on the submission and our review of such estimate. We have examined the financial showings submitted by the other applicants and find that these applicants appear to be financially able to proceed with the construction of their proposed systems. Thus, at this time, it appears that the applicants possess adequate financial qualifications to sustain grants of their applications. However, the true test of each applicant's ability to construct will be its performance on the due diligence requirement. We intend strict enforcement of the due diligence requirement because it would be inappropriate to reserve substantial blocks of spectrum and valuable orbital positions for applicants that fail to fulfill their obligations.

VIII. Conclusion

120. Accordingly, IT IS ORDERED, That the application of Focus Broadcast Satellite Company to conduct direct broadcast satellite operations IS DISMISSED, and the petitions to deny filed by Satellite Business Systems and Southern Pacific Communications Company, as well as associated pleadings that relate to the Focus Broadcast Satellite Company application are similarly DISMISSED.

121. IT IS ALSO ORDERED, That the petitions to deny, objections, and/or other reponsive pleadings, relating to the remaining captioned applications, filed by Aerospace and Flight Test Radio Coordinating Council, American Broadcasting Companies, Inc., Association of American Railroads, Association of Maximum Service Telecasters, Inc., Hispanic Bar Association, the County of Los Angeles, Farinon Electric Operations/Harris Corporation, Forward Communications Corporation (KCAU-TV) *et al;* Media Access Project *et al;* Manufacturers Radio Frequency Advisory Committee, National Association of Broadcasters, National Citizens Committee for Broadcasting *et al,* Oak Communications, Inc., Raytheon Data Systems Co., Satellite Development Trust, Satellite Television Corporation, Satellite Syndicated Systems, Inc., Television Network Affiliates Association, Utilities Telecommunications Council, and Western Communications Research Institute, Inc., ARE DENIED insofar as they are inconsistent with the actions taken herein.

122. IT IS FURTHER ORDERED, That action on the request by Western Union for modification of its authority granted in *Memorandum Opinion and Order and Authorization* (File No. W–P–C–1752), FCC 80–716, 86 F.C.C. 2d 196 (released January 31, 1981), IS DEFERRED and the matter, along with petitions to deny and associated pleadings that relate to that request, will be considered as an application in the Fixed Satellite Service.

123. IT IS ALSO ORDERED, That the above-captioned applications of CBS, Inc. for the first phase of its direct broadcast satellite system to provide three channels high definition television service in the eastern time zone IS GRANTED, and the proposals of CBS, Inc. for the subsequent phases of its system ARE APPROVED, subject to the following conditions:

(a) This grant does not include launch and/or operational authority for the first or subsequent phases of the proposal;

(b) This grant does not include assignment of frequencies or orbital positions for the first or subsequent phases of the proposal;

(c) The assignment of frequencies and orbital positions will await the conclusion of RARC-83 and any proceedings the Commission may deem appropriate to allocate available frequencies and orbital positions;

(d) The assignment of technical parameters is subject to all applicable technical limitations noted in Section V(B) herein.

(e) The applicant must proceed with the construction of its system with due diligence; and

(f) Authority to commence construction of subsequent phases of the proposed system will be considered upon application for minor modification of the construction permit granted herein.

(g) This grant is subject to all policy, procedural and technical considerations noted herein, and all present and future policies adopted in related proceedings, including the DBS rule making.

(h) This grant is conditioned on submission and subsequent review of financial data as noted in paragraph 119, *infra*.

124. IT IS ALSO ORDERED, That the above-captioned application of Direct Broadcast Satellite Corporation for the first phase of its direct broadcast satellite system to provide six primary channels and up to four spot beam channels of service as a common carrier in the eastern one-third of the United States IS GRANTED, and the proposals of Direct Broadcast Satellite Corporation for subsequent phases of its system ARE APPROVED, subject to conditions (a)–(g) outlined in paragraph 123, above.

125. IT IS ALSO ORDERED, That the above-captioned application of Graphic Scanning Corporation for the first phase of its direct broadcast satellite system to provide two channels of service to the western half of the United States IS GRANTED, and the proposals of Graphic Scanning Corporation for subsequent phases of its system ARE APPROVED, subject to conditions (a)–(g) outlined in paragraph 123, above.[88]

126. IT IS ALSO ORDERED, That the above-captioned application of RCA American Communications, Inc. for the first phase of its direct broadcast satellite system to provide six channels of service in the eastern time zone IS GRANTED, and the proposals of RCA American Communications, Inc. for subsequent phases of its system ARE APPROVED, subject to conditions (a)–(g) outlined in paragraph 123, above.

127. IT IS ALSO ORDERED, That the above-captioned application of United States Satellite Broadcasting Company, Inc., for its direct broadcast satellite system to provide service from two satellites, each to deliver

[88] After the record here was closed Graphic Scanning was made a party to a hearing involving several applications to construct one-way paging stations in the Domestic Land Mobile Radio Service. *A.S.D. Answer Service, Inc., et. al.*, 47 F.R. 40896 (October 16, 1982). The Commission concluded that "a substantial issue has been raised as to whether Graphic exercises *de facto* control over [the] applicants, and thus, is the real party in interest. . . ." *Id.*, at paragraph 7. Accordingly, the above grant is further conditioned upon any action the Commission may deem appropriate after it renders a decision in the *A.S.D. Answer Service* case.

three channels to half of the United States IS GRANTED, subject to conditions (a)–(g) outlined in paragraph 123, above.

128. IT IS ALSO ORDERERD, That the above-captioned application of Video Satellite Systems, Inc. for the first phase of its direct broadcast satellite system to provide one channel of service in each time zone using two satellites IS GRANTED, and the proposals of Video Satellite Systems, Inc. for subsequent phases of its system ARE APPROVED, subject to conditions (a)–(g) outlined in paragraph 123, above.

129. IT IS ALSO ORDERED, That the above-captioned application of Western Union Telegraph Company for the first phase of its direct broadcast satellite system to provide national service using two satellites with four channels each IS GRANTED, and the proposals of Western Union Telegraph Company for subsequent phases of its system ARE APPROVED, subject to conditions (a)–(g) outlined in paragraph 123, above.

130. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Memorandum Opinion and Order* to each of the parties to this proceedings.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

Dissenting Statement of Commissioner Anne P. Jones

In Re: Applications for Construction Permits in the Direct Broadcast Satellite Service

When the Commission proposed interim policies and conditions for authorization of experimental and developmental direct broadcast satellite services pending the outcome of the 1983 Regional Administrative Radio Conference, I suggested that our preliminary determination that DBS is in the public interest might be premature. I suggested that because of the conflict between the proposed use of the spectrum by DBS and its current use by railroads, electrical utilities, manufacturers, local governments, and others, a "higher burden is placed upon the Commission in making a public interest finding in favor of DBS" than would otherwise be the case. In my view, none of the applications approved today meet that higher burden.

I have questioned elsewhere whether there is sufficient need for video programming delivered by DBS to justify a finding that displacement of existing users of the 12.2–12.7 GHz band to clear it for this new service is

in the public interest.* But for purposes of today's decision, it is not necessary to even reach this question. It is enough to note that the indefiniteness as to what service these applicants will actually provide, and when and under what circumstances they will provide it, makes it impossible, at least for me, to determine at this time whether grant of these construction permits is indeed in the public interest. In my view it is clearly premature to grant this much spectrum to a service whose time has not yet come, and in fact may never come.

I therefore respectfully dissent.

Concurring Opinion of Commissioner Mimi Weyforth Dawson

I concur in the Commission's action granting seven construction permits for interim direct broadcast satellite service. However, I would not impose a financial condition on the grant of the CBS application.

Last year I objected to the return of six applications for this new, unestablished service. It is a new service with many fundamental questions yet to be answered, and we have established only minimal standards for interim operators. To condition an applicant because of the absence of a *specific* financial plan—which we did not require—is simply untenable.

I recognize that the Commission stated in the Memorandum Opinion and Order returning the six applications that it is "reasonable to conclude that the applicant's proposed method of financing must also be deemed 'pertinent information' required to be submitted to the Commission." 88 F.C.C. 2d at 112. However, I believe that CBS met that burden sufficiently with reference being made to its December 31, 1981, balance sheets. These balance sheets indicate current assets of $1.5 billion with current liabilities of $800 million, and total assets of $2.4 billion with total liabilities of $1.2 billion. What would we do with more information?

Throughout its various pronouncements on DBS, the Commission has neither established financial guidelines nor stated specific need for financial data. In fact, the Commission stated in paragraph 114 of the June 23, 1982, DBS *Report and Order* that:

> In lieu of stringent financial showings and subsequent Commission analysis, we will require that parties granted authorizations proceed with diligence in constructing interim DBS systems.

The condition on CBS is even more ironic in light of the Commission's general relaxation of the required financial showing for broadcast applicants.

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* Remarks by Commissioner Anne P. Jones before the Associated Public-Safety Communications Officers Conference, Miami, Florida, August 16, 1982.

The CBS application includes a description of the type of service to be provided, the technology to be employed and other pertinent information. Thus, CBS has supplied all that we have asked for, and its application should be granted without condition.

Comparative Criteria
Operation Interim

Review Board selected merged applicant for interim operation in comparative proceeding using 1965 *Comparative Policy Statement* as guidance for reaching decision. Winning applicant had preferences for diversification and integration.

—*Joseph Bahr*

BC Docket No. 82–529

FCC 82R–66

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Joseph Bahr	BC DOCKET NO. 82–529 File No. BPIH–820311AB
Balkan Echo, Inc.	BC DOCKET NO. 82–530 File No. BPIH–820405AF
The Global Broadcasting Group	BC DOCKET NO. 82–531 File No. BPIH–820409AA
National Black Media Coalition	BC DOCKET NO. 82–532
File No. BPIH–820419AQ	Multi-Ethnic Radio Philanthropies
BC DOCKET NO. 82–533 File No. BPIH–820429AJ	Latino TV Broadcasting Service, Inc.

BC DOCKET NO. 82–534 File No. BPIH–820430AU	Raul Alarcon, Jr., Luz Miriam Hernadez, and Juan Cossio d/b/a Alarcon, Hernadez & Cossio Assoc.
BC DOCKET NO. 82–535 File No. BPIH–820503AS	For Interim Authority to Operate the Facilities of Former Station WHBI(FM) Newark, New Jersey

APPEARANCES

Frederick D. Cooke, on behalf of Global Broadcasting Group; *Vincent Pepper,* on behalf on Newark Radio Broadcasters Association; and *Morton Berfield,* on behalf of Latino TV Broadcasting Service, Inc.

DECISION

Adopted: November 16, 1982; Released: November 19, 1982

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD: SEPARATE STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL

1. This special comparative proceeding to select an interim operator for the radio facilities formerly licensed to Station WHBI (FM), Newark, N.J. was referred to the Review Board by Commission Memorandum Opinion and Order, FCC 82–365, released August 19, 1982. The Board was directed, if possible, to issue a decision by November 17, 1982. Seven applicants listed in the caption were originally designated but as the result of merger agreements only three entities now remain to be considered: (1) Global Broadcasting Group; (2) Newark Radio Broadcasters Association; and (3) Global Broadcasting Group; (2) Newark Radio Broadcasters Association; and (3) Latino TV Broadcasting Service, Inc. After considering the record complied by the parties in the light of the standards set out in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 383, 5 RR 2d 1901 (1965), as well as three rounds of briefs and an oral argument, the Board has concluded that a

grant to Global Broadcasting Group will best serve the needs of Netwark. *See* paragraphs 23–24 below.

2. *Background:* The radio facilities of Station WHBI(FM), Newark, N.J., became available for interim operation when the Commission refused to renew the license of the existing licensees and judicial review was completed. *See* para. 2, FCC 82–365, *supra*. Seven interim applications, independent of any potential regular applicant for the facilities, were received in response to the Commission's public notice. They were designated for oral argument before the Review Board by the Commission which indicated that under well established precedent such conflicting applications are not entitled to full trial-type hearings which would delay speedy disposition. Accordingly, the Commission scheduled the matter for an oral argument before the Board and directed the parties to file their written comparative showings within twenty days. It authorized the Board to use flexible procedures, schedule preliminary conferences, and "should the need arise" to order the taking of testimony before an Administrative Law Judge. *See* para. 3, FCC 82–365, *supra*.

3. In designating the case for oral argument the Commission specified the standard comparative issue which was framed after issuance of the 1965 *Policy Statement*. *See* para. 8, FCC 82–365, *supra*. A grant of any interim operator was made subject to the following conditions by the Commission:

> ". . . the interim operator authorized shall compute its net profits by the accounting methods used for Federal income tax purpose and shall pay over to recognized local charities those net profits. Distributions shall be made at intervals not exceeding every three months and shall be in an amount not less than 80% of the accumulated net profits so computed." ". . . the interim operator authorized shall, six months after the commencement of operation, file with the Commission an accounting of its revenues, expenses and net profits, if any, and the distribution of such net profits, and shall continue to submit accounts thereafter at intervals of not more than every six months, during the term of the interim opration. The accounting should be submitted to the Chief, Broadcast Facilities Division." [*See* paras. 12, 13, FCC 82–365, *supra*.]

4. *Procedures:* The comparative showing were filed on September 8, 1982. The Board then issued an Order, FCC 82R–54, containing the following schedule:

(1) Pre-oral argument conference—September 15, 1982
(2) Filing of briefs—September 30, 1982
(3) Filing of replies—October 8, 1982
(4) Oral argument—October 15, 1982

At the conference the parties agreed that the schedule was reasonable under the circumstances. It was also established that any prehearing motions, such as requests for enlargement of the issues, should be filed by

September 20, approximately 30 days after release of the Commission's designation order. (Tr. 19–20, 33.)

5. In response to the Board's inquiry the parties indicated that attempts would be made to merge into a joint interim operation, and the Board indicated that petitions for leave to amend growing out of possible mergers would be considered timely even if filed after the date for oral argument. (Tr. 20–22.) Subsequently, October 22 was established as the final day for such petitions, and October 29 for filing final briefs. (Tr. 123–24.)

6. No requests to enlarge issues, to propound written interrogatories, or to take depositions were filed. Our review of the record has persuaded us that there are no substantial or material questions of fact which should be resolved at a trial-type hearing before an Administrative Law Judge. *Bell Telephone Co. of Pa.* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974). The record in this case consists of the comparative showings of the applicants, the original applications, and amendments to those applications.

7. On October 12, 1982, a petition for leave to amend, and a joint request for approval of agreement, were filed which indicated that three of the original applicants, Global Broadcasting Group, Balkan Echo, Inc. and Alarcon, Hernandez & Cossio had agreed to merge their interests into one entity (Global). On October 22, 1982, similar pleadings were filed by Joseph Bahr, National Black Media Coalition, and Multi-Ethnic Radio Philanthropies, three other original applicants, which had agreed to merge into a new entity called Newark Radio Broadcasters Association (Newark Radio). A supplemental petition for leave to amend was filed by Global on October 22, and was opposed by Newark Radio. For the reasons stated below we will permit all the amendments because they are consistent with the procedural guidelines established by the Board; moreover, no party to this case will be prejudiced by acceptance of these amendments.

8. The merger agreements of Global and Newark constitute *bona fide* agreements. *Gemini Broadcasting Co.*, 90 FCC 2d 239 (Rev. Bd. 1982). Though the parties themselves have not proffered the requisite affidavits pursuant to § 73.3525 of the Commission's Rules, setting forth the summary history of the negotiations and the reasons why the agreements are in the public interest, this failure is technical in nature since affidavits of the parties' counsel containing the required information have accompanied the agreements. Global, the corporate entity arising from the first merger, subsequently filed a supplement proposing to change the merged corporation's status from a "profit-making" entity to a "non-profit" organization. This proposed structural change was opposed by Newark Radio as upgrading of the application and as violative of the Board's directive prohibiting further amendments beyond those associated with merger (Tr. 58–59). The supplement filed by Global serves essentially to keep the

Commission apprised of the reality of the situation without impermissibly improving its comparative standing. The structural change in the format of the corporation is not prejudicial because the Commission's express requirement that not less than 80% of the net profits be distributed to charity makes an applicant non-profit in fact if not in name. We conclude below that this is not a cognizable factor of comparison.

9. *Standards:* We now consider what substantive standards to use in judging the three proposals: (1) the Global merged entity; (2) the Newark Radio entity; and (3) Latino TV, an original applicant. All applicants urge that this is a unique comparative case because it involves the selection of an interim non-profit applicant to maintain existing facilities. They urge that the Board should not consider itself bound by the 1965 *Policy Statement* and related precedents. While the Commission specifically gave the Board considerable procedural flexibility, para. 2 above, no similar language in the Order supports the applicants' substantive contentions. On the contrary, the Commission's specification of the standard comparative issue without further comment is some indication that the *Policy Statement* should be utilized. As a practical matter, if the standards of the *Policy Statement* are appropriate for selecting a regular applicant to operate certain radio facilities, those same standards are equally appropriate in selecting an interim operator for the same facilities. We tentatively indicated at the conference that we would be guided by the *Policy Statement* (Tr. 30–33); we now finalize that ruling.

10. In accordance with the *Policy Statement*, none of the applicants will be awarded a preference for proposed programming or studio. They have not made a showing of material or substantial differences. 1 FCC 2d at 397–398. In fact, all propose to continue the multi-ethnic and multilingual types of programming previously broadcast. They do recognize that precautions must be taken to insure adequate control of that programming. *See generally Cosmopolitan Broadcasting Corp.* v. *FCC*, 581 F.2d 917 (D.C. Cir. 1978). Similarly, no applicant will receive a preference because of the nonprofit nature of its proposal, or the charities which will receive its profits. The Commission did not designate these as matters for comparison. Instead it specified basic conditions to be attached to the application which receives a grant. *See* para. 3 above. Such conditions are traditionally used by the Commission to eliminate certain issues from litigation and thereby simplify the hearing process. In essence, our findings and conclusions which follow are based on those factors deemed relevant by the *Policy Statement:* "diversification of control of media of mass communications" and "best practicable service," which in this case includes participation of ownership in management, enhanced by local residence, minority ownership, and broadcast experience."

The Three Applicants

11. Global Broadcasting Group (Global) is a New York corporation formed by the merger of the individual applications of Global Broadcast-

ing Group, Balkan Echo, Inc., and Alarcon, Hernadez & Cossio Associates. Global was formed for the purpose of pursuing the application for the proposed interim operation. The three primary principals (Messrs. LeBow, Antonoff and Alarcon), comprise the sole and equal voting shareholders, each of whom has also been elected a director of the corporation and a manager of the proposed facility. Global also has fourteen non-voting stockholders. (Tr. 75–77; Global Petition to Amend, FCC Form 301, p. 3.)

12. The Newark Radio Broadcasters Association (Newark) is a New Jersey corporation and the product of a merger between Joseph Bahr, National Black Media Coalition, and Multi-Ethnic Radio Philanthropies. Newark is composed of the five major principals of the respective individual applicants, each of whom is a trustee and an officer of the corporation:

Name	*Position*
Anthony Cabelo	Trustee, President
Anthony Coronna	Trustee, Vice President
Joseph Bahr	Trustee, Treasurer
Pluria Marshall	Trustee, Secretary
Lazaro Alvarez	Trustee.

As will be discussed below, each has been appointed to a managerial position at the proposed station. (Tr. 62, Newark Petition to Amend, Ex. 2c, p. 2)

13. Latino TV Broadcasting Service, Inc. (Latino) is a preexisting not-for-profit organization incorporated in June 1976, for the purpose of training minorities for job opportunities in film and mass media and to enhance the image of minorities through the production of minority broadcasts (Latino Comp. Showing, Ex. 1, p. 1). Latino is composed of a ten member Board of Directors and its daily operation is controlled by Livera Perez and Marta Rivera, who besides being directors comprise the only two officers of the corporation (Tr. 90–91; Latino Comp. Showing p. 4, Attachment 1, p. 1).

Diversification of Control

14. Newark, by virtue of the sole proprietorship of Joseph Bahr, has an ownership interest in FM station WVIS, Frederiksted, St. Croix, Virgin Islands (Tr. 69–70; Bahr Comp. Showing, Ex. 1; Bahr Petition to Amend, Ex. 1). Though Mr. Bahr proposes to relocate to Newark, New Jersey, he does not intend to divest ownership of WVIS-FM (Tr. 69–70). Global has no ownership interests but Newark aurges that the distribution of programming and consultancy provided by Raul Alarcon to WLVH-FM, Hartford, Connecticut consitutes a prohibited cross-interest (Tr. 70, 75, 85–86; Newark Final Br. p. 5). A cross-interest issue was not requested by Newark and is therefore not part of this case. In addition, there is no showing that the stations would serve substantially the same area, a prerequisite to application of the policy. *Cleveland Television Corp.*, ___ FCC 2d ___, 52 RR 2d 581 (Rev. Bd. 1982); *K&M Broadcasters, Inc.*, 19 FCC 2d 947, 17 RR 2d 543 (Rev. Bd. 1969). Nor do we believe Mr. Alarcon's role requires a diversification demerit. It does not represent ownership or control at WLVH-FM and its significance as a managerial position has not

been established.[11] Latino similarly has no interests which would impinge on the policy of diversification (Latino Br. p. 6, Latino Comp. Showing, pp. 5–6). Therefore, while the interest of Newark is geographically far removed, it represents 100% ownership of a broadcast station by a 20% Newark principal, and as the only interest held by any of the applicants, it must incur a slight demerit.

Best Practicable Service.

15. Newark has proposed to integrate its five trustees—constituting 100% of the controlling membership of the corporation—into full-time managerial capacities at the station (Tr. 62; Joint Request for Approval, p. 3; Newark Petition to Amend, Ex. 2–C, p. 2). Mr. Cabelo will assume the role of General Manager, Mr. Caronna will serve as Community Relations Director, Joseph Bahr as Engineering Director, Pluria Marshall as Operations Manager, and Lazaro Alvarez as Business Manager. Newark's integration proposal is qualitatively enhanced by the 60% participation of recognized minorities: Messrs. Marshall, Bahr, and Alvarez (Tr. 63; Newark Final Br., p. 8).

16. Global proposed to incorporate 100% of its ownership into management of the station. Each of the voting shareholders, Messrs. LeBow, Antonoff, and Alarcon, will work full time and be responsible for general management, technical operation, and programming, respectively (Tr. 75–76; Global Reply, pp. 2–3; and Supplemental Petition to Amend, Attachment 1, pp. 1–2). Newark, however, asserts that Global's integration is diluted since the non-voting shareholders possess a majority of the stock and may participate to some extent in station operation. We disagree with this contention. Quantitative integration credit is assigned in proportion to the legal authority and voting power which accrues to management for implementation of station policy decisions. *See New Continental Broadcasting Co.*, 89 FCC 2d 631, 634–5, 51 RR 2d 266, 269 (Rev. Bd. 1982); *WHW Enterprises, Inc.*, 89 FCC 2d 799, 816, 51 RR 2d 409, 420–421 (Rev. Bd. 1982); *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 51 RR 2d 1478 (Rev. Bd. 1982). LeBow, Antonoff, and Alarcon possess Global's only voting stock and have been designated as the sole directors (Global Petition to Amend, FCC 301, p. 3), and as such are deemed to possess the requisite controlling interest.

17. The 100% full-time integration of Global is also enhanced by the 33⅓ % minority participation of Raul Alarcon (Tr. 77; Global Reply Br., p. 3); however, no residual merit for minority status will be attributed to the non-voting shareholders since these persons have none of the indicia of management control necessary to allow minority enhancement.

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[1] Raul Alarcon's 10% interest in a pending application for an interim license of station WMIX-FM, Miami, Florida, is not relevant since it is wholly speculative during its pendency. *Greater Wichita Telecasting, Inc.*, FCC 82R–45, 51 RR 2d 1604, 1607, fn. 4 (1982).

18. Latino proposes to integrate its two officer-directors, Livera Perez and Marta Rivera, who will be in control of the day-to-day operation of the corporation. Each of these officers proposes to work thirty-two hours per week at the station. Latino asserts that this exclusive managerial capacity of the officers is analogous to the active managing member of a partnership (Tr. 91), and similar to arrangements which segregate voting and non-voting stock. In support of its contention, Latino recites that the officers have full authority to enter into contracts and make financial commitments without the prior approval of the Board of Directors; that the Board meets only once a year to make a general review of the plans and activities of the officers, having always waived the other two meetings stipulated in the by-laws; and that the Board has never reversed the action and proposals of the officers (Tr. 90–91; Latino Comp. Showing, p. 4).

19. We cannot accept Latino's contentions. On its face Latino's application and comparative showing reveals a traditional corporate structure with each director entitled to a vote in all matters of management. While it asserts that actual control lies with the officers, and that its Board of Directors does not exert its managerial power, it has failed to substantiate with any formal evidence or documentation that the Board has indeed relinquished control to two of its members. Applicants faced with comparative selection knowingly assume the burden to factually support their proposals, yet Latino has failed to demonstrate that the officers possess exclusive authority and voting control over station policy and management. *New Continental Broadcasting Co., supra.* Rather, the record shows that the Board of Directors may outvote the officers on any station policy though they have never seen fit to do so. *See WHW Enterprise, Inc., supra.* Latino has essentially asked that the Review Board look behind the corporate countenance and recognize that the functional reality is that of a limited partnership. It is incumbent upon the applicant, however, to make some showing, beyond mere recitation, to support its contention. It may be that the Board of Directors, with the exception of its officers is merely honorific and wields no actual control, but there is no factual showing to substantiate that conclusion. Absent factual support, we cannot look beyond the established legal structure.

20. Because Mmes. Perez and Rivera represent only two of the ten directors of Latino and each proposes to work only 32 hours per week at the station, we are compelled by precedent to credit Latino with only 20% "substantial" integration compared to the 100% full-time integration awarded to Newark and Global. *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 50 RR 2d 1142 (Rev. Bd. 1981). Despite the appreciable enhancement engendered by the participation of managers who are each a minority and a female (Tr. 6; Br. 6), Latino's proposal is substantially behind that of Newark and Global.

21. With regard to local residence, three of the five Newark principals, (Messrs. Alvarez, Cabelo, and Caronna) live in the primary service area, while the remaining two (Messrs. Bahr and Marshall) propose to relocate to the city of Newark from their respective residences in the Virgin Islands and Washington, D.C. (Tr. 67–68; Newark Cert. of Incorp.). All three of Global's integrated principals live in the primary service area (Global Petition to Amend, FCC 301, p. 3), as do the two integrated principals of Latino (Latino Br., p. 6). The principals of each applicant who reside in the service area have done so for a number of years and have been active in the area. Thus, Global and Latino TV are better enhanced under this factor because they offer 100% local residence enhancement as against 60% for Newark.

22. Each applicant is enhanced by its principals' broadcast experience. Newark offers the experience of Joseph Bahr, an experienced owner and manager who has constructed a radio facility himself (Tr. 62; Newark Petition to Amend, Ex. 2–C, p. 1). Global's principals have extensive operational and programming experience: Mr. LeBow has more than 35 years of active participation in radio and television broadcasting, programming, and management (Tr. 78; Global Comp. Showing, Ex. 2); Mr. Antonoff has been a broadcaster and producer of ethnic programming for approximately 20 years, 19 of which were spent as the chief producer of ethnic broadcasts for WHBI-FM (Tr. 78, Balkan Echo Br., p. 4); and Mr. Alarcon is similarly an experienced produced of Hispanic-oriented broadcasts (Tr. 78; Alarcon Comp. Showing, p. 2). The managers of Latino, Mmes. Perez and Rivera, also have experience in broadcasting and production (Tr. 98; Latino Comp. Showing, p. 3). While each applicant has some past broadcast experience, it is apparent that Global has incorporated a select group of experienced professionals whose cummulative experience is superior to that of the other two applicants.

Conclusions

23. Summarizing the preferences awarded, we conclude, under diversification, that Global and Latino are each awarded a slight preference over Newark, but are equal with respect to each other. Global and Newark are each awarded a substantial integration preference over Latino due to the quantitative disparity between Global's and Newark's 100% full-time proposals and Latino's 20% substantial integration. Latino's qualitative enhancements for local residence and female participation cannot overcome this significant quantitative gulf. *See Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1018, 50 RR 2d 115 (Rev. Bd. 1981). While Latino also claims decisive credit as the only applicant with an existing organization, non-profit status, and history of working for minority employment in broadcasting, as indicated earlier, we are adhering to the factors of comparison set forth in the *Policy Statement*

and not awarding preferences based on such novel considerations. Moreover, to accept Latino's position would necessarily be to diminish the proposals of its competitors not because of any inherent deficiencies in them, but merely on the supposition that newly formed groups are not as likely to succeed as an existing one. All three applicants seem to us, however, to be worthy and well-constructed and therefore we reject Latino's arguments.

24. Global is the only applicant with preferences under both diversification and best practicable service. While equal with Latino on diversification, its substantial superiority on integration renders it ahead of that applicant overall. Between Global and Newark, the selection is closer. Although Global earns a diversification preference, that advantage is only slight because of the remoteness of Newark's broadcast interest. Under integration, the only differences between the applicants are qualitative since each proposes 100% full-time integration. A slight advantage accrues to Global for its proportionally superior broadcast experience and local residence, while Newark deserves a slight plus for its greater participation of minorities. These differences balance out and are virtually equal; even if we were to decide that Newark merits a marginal advantage, the slight integration preference which would accrue to it would be insufficient to overcome its diversification demerit. Under the 1965 *Policy Statement*, *supra* at 394, diversification is deemed a primary goal, whereas integration is only one of several factors predictive of best practicable service to the public. An advantage under the diversification criterion, therefore, is generally considered to be more significant than a like integration advantage. *Gilbert Broadcast Corp.*, 91 FCC 2d 450, 52 RR 2d 429, 444 (1982); *Colorado West Broadcasting, Inc.*, 57 FCC 2d 526, 35 RR 2d 1637 (Rev. Bd. 1976); *Terre Haute Broadcasting Corp.*, 25 FCC 2d 348, 19 RR 2d 487 (Rev. Bd. 1970). We conclude therefore that Global is superior to both Newark and Latino and the public interest would be served by a grant to its interim application.

25. ACCORDINGLY, IT IS ORDERED, That the application of Global Broadcasting Group for the interim authority to operate the facilities of former station WHBI(FM) Newark, New Jersey IS GRANTED subject to the conditions specified in paragraph 3, above, and the mutually exclusive applications of Newark Radio Broadcasters Association and Latino TV Broadcasting Services, ARE DENIED;

26. IT IS FURTHER ORDERED, That the Joint Request for Approval of Agreement and Dismissal of Application, filed October 12, 1982, and Supplement thereto, filed October 22, 1982, and the Petition for Leave to Amend, filed October 12, 1982, and the Supplemental Petition for Leave to Amend filed October 22, 1982, by Global Broadcasting Group and the Joint Request for Approval of Agreement, filed October 22, 1982, by Newark Radio Broadcasting, Inc. and the Petition for Leave to Amend

filed October 22, 1982 by Multi-Ethnic Radio Philanthropies ARE GRANTED; and that Newark's Motion to Strike "Supplemental Petition or Leave to Amend," and other supplemental pleadings ARE DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino *Chairman, Review Board*

SEPARATE STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL

This is a very unique proceeding. The task directed by the Commission is to choose an interim operator for the facilities of WHBI(FM), Newark, New Jersey, the license for which was lost by the incumbent licensee, Cosmopolitan Broadcasting Company. However, unlike the more conventional situation wherein the applicants for interim authority are simultaneously seeking the "permanent" license,[1] the present interim applicants are specifically precluded from "filing for regular use of the frequency."[2] Because this proceeding appears *sui generis* in the Commission's archives, there is substantial temptation to consider inapposite our customary comparative criteria and to base a selection on some other standard(s) which might more closely effectuate the rather special purposes of this interim licensing action. That temptation is undoubtedly titillated by the only "partial success"[3] of some previous interim broadcast operations.[4]

Were the Board empowered to invoke, in effect, an administrative *cy-pres* doctrine, the application of Latino TV would seem custom-made for the Newark niche. Latino is a going eleemosynary concern with a laudable track record in producing minority programming and training minority broadcasting aspirants.[5] Its application suggested, *prima facie*, the

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[1]*See, e.g., Leflore-Dixie Employee Venture*, 90 FCC 2d 951 (Rev. Bd. 1982), *proceeding terminated*, 90 FCC 2d 954 (Rev. Bd. 1982).

[2]The Commission established this precondition when it invited interim applicants. *In re Application of Joseph Bahr, et al.*, FCC 82–365, released August 19, 1982, at para. 2, *citing Public Notice* (Mimeo #1969), released February 3, 1982.

[3]Quoting President Carter on the outcome of the ill-fated 1980 Iranian hostage rescue attempt.

[4]*See, e.g., 1430 Associates, Inc.*, 40 RR 2d 879 (1977) (serious allegations of misconduct by Newark, N.J. interim operator); *Oak Knoll Associates*, FCC 77–451, released June 28, 1977 (ordering interim operator to show cause on a plethora of allegations of financial misconduct).

Even the Board's most recent attempt to engender a joint interim operation in *Leflore-Dixie*, *supra* n.1, in accord with the precepts of *Fidelity Voices, Inc.* v. *FCC*, 477 F.2d 1248 (D.C. Cir. 1973) has been, apparently, of transitory efficacy. On information and belief, the Mississippi joint venturers almost immediately vacated their July 1982 agreement and, for a time at least, there was a brown-out in Greenwood.

[5]*Brief of Latino TV Broadcasting Service, Inc.*, at 4–6.

likeliest device to avert a "Desert One" on the frequency of WHBI. However, anticipating that its application might experience a shortfall under the application of our traditional criteria, Latino urged "that it would be perilous to decide this case solely on the basis of the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). . . ."[6]

Nonetheless, the law looks with extreme disfavor on *ad hoc* administrative adjudications based on *post hoc* standards. Thus, in the complete absence of alternative selection standards, the Board announced at preliminary conference that it would be generally guided in its choice by the *regimentum* of the *Policy Statement*, predominantly on the postulate that the Commission would be seeking many of its usual comparative goals (*i.e.*, diversification, integration, *etc.*) in selecting this interim operator. Were the Board to have unilaterally eschewed the *Policy Statement* criteria and based its decision on novel, previously unannounced standards, our choice "might [as] well have been the product of omphalic inspirations, or ornithomancy, or haruspication, or aleatory devices. . . ." *Old Colony Bondholders* v. *New York, N.H. & H.R.Co.*, 161 F.2d 413 450 (2d Cir. 1947) (Frank, J. dissenting in part). At a minimum, it would have been arbitrary, if not capricious or abuse of discretion. *See* 5. U.S.C. § 706(A).

It must also be said that, absent the mergers of the various applicants,[7] the instinct to favor Latino TV *e mera gratia* would have been well neigh insuperable. However, and as the Board decision notes (at para. 23), all three post-merger applicants appear amply qualified. On the record herein and the neutral application of the *Policy Statement* criteria, Global has the dispositive edge. "Mechanical" though it may be criticized, the Board's result is legally correct."

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[6]*Latino Reply Brief*, at 2. Notwithstanding, the selection of a winning applicant in any case ordered by the *Policy Statement* is not without an element of adventure, even hazard.

[7]The Board actively encouraged mergers amongst the original seven applicants in the belief that a merged applicant combining the strength of its erstwhile competitors would itself be stronger. *See* Transcript of Conference in Dkt. No. 82–529, September 15, 1982, *passim*.

Amateur Radio Service
Interference, Willful
License, Revocation
Obscene, Profane, Indecent Language
Review by Review Board

Review Board affirmed revocation of Amateur Radio Service station license and suspension of operator license for willful interference; does not reach questions of indecent language or lack of candor.
—*Kenneth L. Gilbert*
PR Docket No. 81–721

FCC 82R–65

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Revocation of License of KENNETH L. GILBERT 704 Kingsford Street Monterey Park, California 91754 Licensee of Station KB6TG in the Amateur Radio Service and Suspension of License of KENNETH L. GILBERT 704 Kingsford Street Monterey Park, California 91754 Amateur Advanced Class Radio Operator License	PR DOCKET NO. 81–721 PR DOCKET NO. 81–722

APPEARANCES

Kenneth L. Gilbert, pro se; and *Carol Fox Foelak,* on behalf of the Chief, Private Radio Bureau, Federal Communications Commission.

DECISION

Adopted: November 10, 1982; Released: November 18, 1982.

Board Member Blumenthal for the Review Board:

1. This proceeding involves the revocation of license for Kenneth L. Gilbert's (Gilbert) Amateur Radio Station KB6TG and the suspension of his Amateur Advanced Class Radio Operator license based on Administrative Law Judge (ALJ) Thomas B. Fitzpatrick's determination that, on March 18, 1981, Gilbert transmitted indecent language and willfully caused interference to other ongoing Amateur radiocommunication and thereby violated Sections 97.119[1] and 97.125[2] of the Commission's Rules, 47 CFR §§ 97.119 and 97.125. Initial Decision (I.D.), FCC 82D–41, 92 FCC 2d ____. On June 17, 1982, Gilbert filed exceptions, one page in length, objecting generally to the ALJ's conclusion that he had engaged in malicious interference and had used indecent language. He also argues that the original notice of violation made no mention of a Section 97.119 violation, but alleged only that Section 97.125 had been violated, and submits that a one-year suspension, but not complete revocation, would be appropriate in this case. In its reply, the Private Radio Bureau argues that the ALJ correctly determined that Gilbert engaged in malicious interference and that Gilbert's argument concerning Section 97.119 (indecent language) need not be addressed because the Section 97.125 (interference) violation standing alone warrants revocation of his station license and suspension of his operator license.[3] The Board has reviewed the I.D. in light of these pleadings and the record and adopts the ALJ's finding of fact as well as his ultimate conclusion that Gilbert's Amateur station license should be revoked and his Amateur operator's license suspended.[4]

2. The ALJ's findings clearly establish that Gilbert deliberately interfered with the transmissions of other Amateur radio operators. On March 18, 1981, a group of Amateur radio operators known as the Brown Sugar Net (Net) was transmitting on 14.310 MHz. (I.D., Findings, paras. 8–9, 19.) Gilbert also began transmitting on 14.310 MHz thus causing electrical interference to the Net's communications. (I.D., Findings, paras. 10–11, 14–15, 21, Conclusions, paras. 2–4). Although Gilbert was advised that the frequency was in use, he continued to talk over the transmission of the Net participants. (I.D., Findings, para. 21, Conclusions, paras. 2–4.)

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[1] Section 97.119 bars the transmission of communications containing obscene, indecent, or profane words, language, or meaning.

[2] Section 97.125 states: "No licensed radio operator shall willfully damage, or cause or permit to be caused interference to any radiocommunications or signals."

[3] The Bureau also argues that Gilbert's exceptions should be dismissed on procedural grounds because they are not in the proper form and lack particularity. *See* Sections 1.276 and 1.277(a) of the Rules, 47 CFR §§ 1.276 and 1.277(a). We have, however, considered them on the merits.

[4] Oral argument was not requested by either of the parties.

Subsequently, the Net changed frequencies to 14.305 MHz only to have Gilbert also switch to that frequency and persist in interfering with their communications. *Id.* The Net switched back to 14.310 MHz and again Gilbert persisted in following and interfering with them. *Id.* Thus, the Board agrees with the ALJ that Gilbert manifestly caused interference to other users in violation of Section 97.125.

3. The willfulness of Gilbert's conduct is not in dispute and is also clearly demonstrated by the record; Gilbert knew he was following the Net in order to engage in what he himself describes as "a type of Amateur Radio argument of sorts" (Br.). *See Bernard J. Winner*, 48 RR 2d 799, 801 (Rev. Bd. 1980). Gilbert's conduct interfered with the rightful use of the frequency by other Amateur operators who already had communications in progress and caused them to switch frequencies in a vain attempt to elude Gilbert's interference. Consequently, the value and availability to the public of the frequency were lost during the period in question. We have recently held that willful interference with radio communications is a serious offense specifically prohibited by the Communications Act and warrants the removal of a station license and suspension of an operator license. *Gary W. Kerr*, FCC 82R–46, *91* FCC 2d *107*. *Donald E. Gilbeau*, FCC 82R–47, 91 FCC 2d, *98*, *see also* Section 303(m)(1)(E) of the Communications Act of 1934, as amended, 47 U.S.C. § 303(m)(1)(E). The same result obtains on the facts of this case. In light of our holding that Gilbert's transmissions in violation of Section 97.125 require revocation and suspension, it is unnecessary to determine whether Gilbert also violated the provisions of Section 97.119.[5]

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[5] We are compelled to address one facet of the I.D. as it pertains to Section 97.119. The ALJ cited *F.C.C.* v. *Pacifica Foundation*, 438 U.S. 726 (1978), for the proposition that indecent language, transmitted in the Amateur Radio Service, is not protected speech within the First Amendment and that, therefore, the Commission may regulate or prohibit it without infringing upon the constitutional rights of the speaker. *Pacifica* deals with the radio broadcast of "indecent" language while the instant case deals with transmissions over the Amateur Radio Service. Thus, the Court's concerns respecting the pervasive presence of the broadcast media and its unique accessibility to young children are inapplicable here. Furthermore, the Court expressly limited its holding to radio broadcasts: "It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher. . . ." 438 U.S. at 750. *See also United States* v. *Simpson*, 561 F.2d 53 (7th Cir. 1977).
We also do not reach the question of whether Gilbert was lacking in candor in his response to the Commission's Official Notice of Violation. See I.D., Conclusions, para. 8. The evidence is sufficient, without reference to Gilbert's candor, to warrant the sanctions imposed.

NOTE: Pursuant to Section 1.104 of the Rules, 47 CFR § 1.104, the revocation and suspension ordered herein become effective 40 days after the release date of this Decision, unless an application for review or petition for reconsideration is filed within 30 days, in which case the effective date will be suspended pending further order of the Board or Commission. Immediately upon the effective date of this Decision, the licensee shall forward to the Commission the licenses revoked and suspended. Operation of the Amateur radio station herein after the effective date will be in violation of Section 301 of the Communications Act of 1934, as amended, and will subject any person in violation to the penal sanctions specified in Section 501 of the Communications Act. A copy of this Decision shall be served by Certified Mail, Return Receipt Requested, on Kenneth L. Gilbert at his last known address, 704 Kingsford Street, Monterey Park, California 91754.

4. ACCORDINGLY, IT IS ORDERED, That, the license of Kenneth L. Gilbert for Station KB6TG in the Amateur Radio Service IS REVOKED, and his Amateur Advanced Class Radio Operator license IS SUSPENDED for the remainder of the license term.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal *Member, Review Board*

FCC 82D–41

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Revocation of License of KENNETH L. GILBERT 704 Kingsford Street Monterey Park, California 91754 Licensee of Station KB6TG in the Amateur Radio Service and Suspension of License of KENNETH L. GILBERT 704 Kingsford Street Monterey Park, California 91754 Amateur Advanced Class Radio Operator License	PR DOCKET NO. 81–721 PR DOCKET NO. 81–722

APPEARANCES

Stanley S. Seeman on behalf of Kenneth L. Gilbert; and *T. Todd Hodgdon* on behalf of the Chief, Private Radio Bureau, Federal Communications Commission

INITIAL DECISION
OF
ASSISTANT CHIEF ADMINISTRATIVE LAW JUDGE THOMAS B. FITZPATRICK

Issued: May 17, 1982; Released: May 24, 1982

PRELIMINARY STATEMENT

1. Kenneth L. Gibert (Gilbert) is the licensee of Station KB6TB in the Amateur Radio Service and holds an Advanced Class Amateur Radio Operator license. Those licenses were granted on November 2, 1979, for five year terms.

2. On September 3, 1981, the Chief, Private Radio Bureau (Bureau), acting pursuant to delegated authority, issued an *Order to Show Cause Why License Should Not Be Revoked and Suspension Order (Order).*[1]

3. The *Order* specified the following issues for determination:

(a) To determine whether Gilbert willfully violated Sections 97.119 (communications containing obscene, profane or indecent words, language or meaning) and/or 97.125 (wilful or malicious interference) on March 19, 1981.

(b) To determine whether Gilbert is qualified to remain an Amateur radio station licensee.

(c) To determine whether Gilbert's license for Amateur Radio Station KB6TG should be revoked.

(d) To determine whether the Suspension of Gilbert's radio operator license should be affirmed, modified or dismissed.

4. A *Corrected Order To Show Cause Why License Should Not Be Revoked and Suspension Order (Corrected Order)* was issued on November 10, 1981. This *Corrected Order* changed the date of the alleged violations from March 19, 1981, to March 18, 1981, because of the difference between Greenwich Mean Time and Pacific Standard Time.

5. The prehearing conference and hearing were held in Los Angeles, California on February 18, 1982, at which time the record was closed. The Bureau and Gilbert filed Proposed Findings of Fact and Conclusions of Law on April 8 and April 12, 1982, respectively, and both filed Replies on April 23, 1982.[2]

Findings of Fact

6. As noted, *supra,* Kenneth L. Gibert is the licensee of Amateur Radio Station KB6TG and holds an Advanced Class Amateur Radio Operator license. (TR 17) Those licenses expire on November 2, 1984. (TR 20, 21) Gilbert lives at 704 Kingsford Street, Monterey Park, California. He has been an Amateur radio operator for about 22 years and has never before been charged with any violations of the Commission's Rules. (TR 17, 192)

A. Monitoring of 14.310 MHz By The Commission on March 18, 1981

7. James E. Phillips has been employed by the Commission as an Electronics Technician at its Allegan Monitoring Station in Allegan,

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[1] The *Order* provided that the suspension would be held in abeyance if Gilbert submitted a written statement or requested a hearing. Gilbert, by reply dated September 29, 1981, requested a hearing.

[2] Also, the Bureau filed an "Erratum" on April 23, 1982.

Michigan for eight years. In that capacity, he monitors radio spectrum looking for violations of the Commission's Rules and performs long range direction-finding on stations which are detected in violation of the Rules. One of the frequencies he was monitoring on March 18, 1981 was 14.310 MHz in the Amateur Band because the monitoring station had received complaints of interference alleged to have been caused by a station identifying as KB6TG. (TR 43)

8. Phillips was working the 4:00 p.m. (PST) to midnight shift and began monitoring 14.310 MHz at about 3:00 a.m. Greenwich Mean Time (GMT), which was 7:00 p.m. Pacific Standard Time (PST). (TR 43, 44)[3] He heard the Brown Sugar Net in operation and began taping the transmissions. (TR 45)

9. The Brown Sugar Net, a group of amateurs who meet daily on 14.310 MHz at about 7:00 p.m. PST, has been in operation for approximately six years. It is a friendly gathering of a large group of hams for friendly conversations. (TR 120) It has no membership certificates or member numbers. Anyone who has an Amateur license which permits him to talk on that frequency is welcome to become part of the net. (TR 141)

10. KB6TG began transmitting at 7:41 p.m. PST. (Bureau Ex. 7) With the assistance of six other Commission monitoring stations, Phillips performed long range direction-findings and determined that KB6TG's signal was emanating from the Los Angeles, California area. (TR 57, 58)[4]

11. On a number of occations during Phillips' monitoring of 14.310 MHz on March 18, 1981, he noted that KB6TG transmitted during periods when another station was already transmitting on that frequency. (TR 99; Bureau Ex. 7).

12. During his transmissions on March 18, KB6TG used the following words, phrases or descriptions: "God Damn", "Asshole", "shit", "homosexual", "homosexual dope pervert", "bastard", "suck off", "ass suckers" and "Jesus Christ", several of them more than once. (Bureau Ex. 7). He had used the same language during his transmissions on March 4, 1981, as well as the words or phrases "bullshit", "horseshit" and "son-of-a-bitch". (TR 83–96, 103) KB6TG was told the history of the Brown Sugar Net on March 4, 1981 by a net member and requested not to use such language. KB6TG's response was that he would use any four letter words he desired and to get their recorders out because he would be back the next day with the same words. (TR 95, 96, 103, 104)[5]

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[3] Although some of the testimony and exhibits refer to GMT and some to PST, all times will be given as PST.

[4] Phillips had monitored 14.310 MHz on March 4, 1981, and the person who had identified as KB6TG on March 18 sounded like the same person who had identified as KB6TG on March 4. (TR 84, 86) The Brown Sugar Net had been in operation on March 4. (TR 85)

[5] Phillips, during the March 4, 1981 monitoring, took a bearing on the KB6TG signal with the directional equipment. The bearing indicated the transmission was from the Los Angeles area. (TR 104)

13. On March 4, 1981, KB6TG transmitted when another station was transmitting. Two licensees were holdings a conversation and KB6TG interrupted their conversation. This interference by KB6TG happened more than once on that day. (TR 103–104)

14. Phillips taped the transmissions on March 18, 1981 on 14.310 MHz. The transcript of this tape was received in evidence as Bureau Ex. 7 and is attachment A* to this Initial Decision. Phillips acknowledged that there were "gaps"[6] in the conversations on 14.310 MHz on March 18, 1981 which lasted as much as 30 seconds. (TR 78–81) Phillips also acknowledged that frequently a well-intended person might interfere with another conversation on the frequency because he did not hear the transmission. There is no certainty that when one commences transmitting on a frequency that someone in another location is not already carrying on a conversation. (TR 112) However, a study of Bureau Ex. 7 makes clear that Gilbert was informed that the frequency was in use. Moreover, he switched frequency on two occasions on March 18, 1981 in order to interrupt the conversations of the Brown Sugar network participants, thus, causing interference. (TR 98, 99, 125–126)

15. Gilbert admitted transmitting on the frequency 14.310 MHz at about 7:30 p.m. PST on March 18. (TR 22, 23, 194)[7] According to Gilbert, he first listened to determine if there was a conversation in progress and when he didn't hear anything he started talking. He continued to transmit after being informed that the frequency was already in use by the Brown Sugar Net and, he claims, people "got very abusive" and threatened him. (Bureau Ex. 7; TR 194–196) During that period of time, Gilbert was going through a divorce, was having trouble finding a job, and was having trouble with his son. (Bureau Ex. 4; TR 196) Gilbert acknowleged that he had two or three beers that night, but maintained he wasn't intoxicated. (TR 197, 217–218) Gilbert does not believe he had a drinking problem at the time, although several of his friends thought he did and he mentioned the fact that he had been drinking, apparently offering it in mitigation, in his response to the Notice of Violation sent him by the Commission. (Bureau Exs. 3 and 5; TR 197)[8] Gilbert agreed that he would not use the language he did if women were present. He acknowledged that one does not know whether children are listening on an amateur frequency. His only explanation was that he was "extremely provoked" by the threats and abuse he received. (TR 211–212, 219)

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[6] Phillips identified a "gap" as a time frame during which he was unable to discern any intelligible signal. (TR 78) Bureau Ex. 7 does not indicate these gaps. (TR 77, 81–82).

[7] He remembered specifically talking to WD9DUF. (Bureau Ex. 7; TR 23, 193)

[8] Gilbert, in his response, acknowledged that he had been drinking that night, explaining that this "obviously added to the confusion and my bad language." (Bureau Ex. 3)

16. Gilbert did not recall whether he operated on 14.310 MHz on March 4, 1981. He denied that he made the statements or used the words attributed to him by Phillips of the FCC. (TR 204–205)

17. Gilbert acknowledged that Bureau Ex. 7, the transcript of what he transmitted on March 18, was "fairly accurate." However, he explained that it did not include the threats made to him by others. (TR 206, 225) In a general sense the threats were "we are going to get you", "get off this frequency", a statement about what his mother did for a living and "these kind of comments". (TR 206, 207) The transcript does contain some statements which appear to be implied threats against him. (Bureau Ex. 7)

18. Gilbert maintained that he did not pay much attention to tuning his transmitter. (TR 223, 224) He could not explain what he meant by the term "bad language" in his response to the Notice of Violation.[9] Gilbert explained that he continued to talk after being informed that the frequency was in use because the person who had informed him of the frequency's use had not identified. (TR 226) When it was pointed out that the other person did identify, Gilbert stated, "I don't even know if he is a licensed ham. I don't know who the hell he is." (TR 227)

B. The Brown Sugar Net

19. As noted, *supra*, the Brown Sugar Net is a group of amateurs who meet daily on 14.310 MHz at about 7:00 p.m. PST for friendly conversations. John B. Dolman has been an amateur operator for about 20 years and is the unofficial net control of the Brown Sugar Net. (TR 120) His station is located in Citrus Heights, California and he was the net control on March 18, 1981. (TR 121)

20. Dolman had talked with Gilbert over the telephone on March 3 concerning his interference with the net on March 3 and recognized his voice as that of the operator who was identifying as KB6TG on March 18. (TR 127, 128, 129) Dolman had telephoned Gilbert on March 3 to learn why he had been interfering with the Brown Sugar Net and why he was mad at the net. Gilbert told Dolman that someone had been talking about him on the net. Dolman cautioned Gilbert that he could lose his license for causing deliberate interference. (TR 127–128)

21. Dolman was also the net control on March 18 when the transmission of the net participants was interfered with by Gilbert. (Bureau Ex. 7; TR 99–100, 123–125) Because of this interference on 14.310 MHz, Dolman told the net participants to change frequencies to 14.305 MHz. (Bureau Ex. 7; TR 98, 99, 123, 125) However, this was to no avail since Gilbert also

[9] The Notice did not cite Gilbert for a violation of Section 97.119 (communications containing obscene, profane or indecent words, language or meaning.) However, the Notice did set forth an "intercept" of part of the taped transmission on 14.310 on March 18, 1981. (Bureau Ex. 2)

switched to 14.305 MHz and continued to interfere with their transmissions. (Bureau Ex. 7; TR 98, 99, 125) Gilbert's interference was tolerated as long as the participants could and then they moved back to 14.310 MHz in another attempt to get away from him. Unfortunately, Gilbert persisted and followed them causing interference. (Bureau Ex. 7; TR 98, 99, 126) Gilbert interfered with the other transmissions by transmitting at the same time and drowning them out. As noted, *supra*, he did this both on March 4 and March 18. (Bureau Ex. 7; TR 98, 99, 100, 101, 125) He did this several times on March 18 after asking if the frequency was in use and being informed that it was. (Bureau Ex. 7; TR 125) He made statements, such as that he owned 14.310 MHz, having paid the FCC for it; that he was not licensed to operate on 14.345 MHz or 14.310 MHz; and that he had obtained his license at Disneyland. He implied that he was not afraid of the FCC. (Bureau Ex. 7)[10]

C. Testimony of Boston and West

22. Richard Boston and Robert West testified as to Gilbert's good radio operating habits. (TR 156, 232)[11] Both knew him only from listening to his radio transmissions or from radio communications with him. (TR 182, 233) Both have had problems with the West Coast Amateur Radio Service (WCARS), another net. (TR 185, 186, 239). Neither had heard Gilbert transmitting on March 18, 1981. Neither had had any run-ins with the Brown Sugar Net. Both had never heard of it. (TR 184, 239) Both, however, did not like net-type operations. (TR 166, 234, 237, 238) Boston had quite often heard Gilbert on the 80 meter band participating in conversations with a "group" of amateurs and had talked to him on the 40 meter band. According to Boston, the difference between a "group" and a "net" is "all in the mind". (TR 175) West had heard Gilbert and other "animals" on the 20 meter "jungle". (TR 234)

23. Boston, West and Gilbert all maintained that there has been, for some time, an on-going and increasing problem caused by the so-called "nets" taking over certain frequencies as though they owned them or had an exclusive franchise to possess them. According to them, the net participants camp or park on particular frequencies for hours at a time and attempt to dissuade non net participants from using those frequencies. They claimed that these tactics frequently result in the net participants engaging in name-calling and the making of threats to the nonparticipants. However, it must be noted that Messrs. Boston and West were

[10] When he talked to Dolman on the telephone on March 3, Gilbert claimed to be independently wealthy and that he had "a battery of lawyers" that can make the FCC look sick. (TR 128) Gilbert denied making this statement. (TR 197–198)

[11] Boston, a ham for 44 years, has the highest amateur license available and holds a first class radiotelephone license and a first class telephone license. (TR 156) West, a ham operator for 22 years, holds an advanced class amateur operator license. (TR 232)

basing their observations as to the operation of nets on their experience with the WCARS net. It must be further noted that neither had any experience with the Brown Sugar Net. (TR 167–172, 193–196, 217, 234–238)

D. Gilbert's Knowledge re Brown Sugar Net

24. Gilbert acknowledged that Dolman had told him on March 3 that the Brown Sugar Net operated on 14.310 MHz. He received two phone calls the next two evenings from individuals threatening him and telling him to stay off 14.310 MHz. (TR 215–217, 221–222, 228) Gilbert, in his response to the Notice of Violation, represented to the Commission that he was not aware of "14.309 MHz" being in use as the Brown Sugar Net. (Bureau Ex. 3) Gilbert's explanation was that during March 1981 he had no way of knowing whether any person transmitting on 14.310 MHz was "a member of this so-called Brown Sugar Net." (TR 229)

Ultimate Findings and Conclusions

1. The ultimate question for resolution is whether Kenneth L. Gilbert's Amateur Radio Station KB6TG license should be revoked and whether his Amateur Advanced Class Radio Operator license should be suspended. These licenses presently expire on November 2, 1984. In resolving this question it must be determined whether Gilbert, on March 18, 1981, wilfully violated Sections 97.119 and/or 97.125 of the Commission's Rules. Section 97.119, 47 C.F.R. 97.119, provides that no licensed operator or other person shall transmit communications containing obscene, indecent or profane words, language or meaning. Section 97.125, 47 C.F.R. 97.125, provides that no licensed radio operator shall wilfully or maliciously interfere with or cause interference to any radio communications or signal. For the reasons set forth, *infra*, it is concluded that revocation of the KB6TG license and suspension for term of Gilbert's Amateur Advanced Class Radio Operator license are warranted.

2. The facts establish that on March 18, 1981 Gilbert began interfering with transmissions by participants of the Brown Sugar Net on the 14.310 MHz frequency. This interference was caused by Gilbert talking while other transmissions were in progress. He did this despite the fact that he was repeatedly notified that the frequency was in use; that such transmissions were in progress and that he was interfering with the transmissions. The record further establishes that the Brown Sugar Net participants changed frequency twice on March 18 in an attempt to avoid Gilbert's interference. However, in both instances, Gilbert followed them, continued to harass the net participants and to interfere with their transmissions. Bureau Ex. 7 (attachment A*) clearly establishes that Gilbert wilfully interfered with the transmissions of the Brown Sugar Net participants on March 18, 1981.

3. Gilbert persisted in causing interference to the transmissions of the participants of the Brown Sugar Net on March 18, 1981. It is recognized that there are no Commission decisions defining interference as used in 47 C.F.R. 97.125. It is appropriate to look for guidence in other areas of the Commission's regulation. In this connection, it is noted that 47 C.F.R. 13.69, which applies to commercial radio operators, is worded the same as 47 C.F.R. 97.125. The Commission has made clear that the term "interference" applies to conduct reasonably calculated to interfere with the normal transmission of a radio signal. *Howard A. Chamberlin*, 21 FCC 231 (1956); *Stephen A. Wichrowski, Jr.*, 15 FCC 2d 754 (Rev. Bd. 1968). As noted, *supra*, Gilbert continuously talked over the transmissions of the Brown Sugar Net participants after being advised that the frequency was in use and deliberately followed them on two occasions to other frequencies and continued to harass the net participants by interfering with their transmissions.[12] It is ruled that this conduct constituted a wilful violation of 47 C.F.R. 97.125. The record establishes that Gilbert knew what he doing and intended to harass and disrupt the transmission of the Brown Sugar Net participants on 14.310 MHz on March 18, 1981. Gilbert's behavior in following the net participants to another frequency and continuing his harassing tactics establishes that he deliberately and maliciously interfered with their transmissions. This wilful violation of the Commission's Rules, standing alone, warrants revocation of the license of Station KB6TG and suspension of Gilbert's Amateur Advanced Class Radio Operator license.

4. The Presiding Judge agrees with the Bureau that there can be no more serious violation of the amateur airwaves than preventing other operators from communicating with each other. Surely, the recent increase in the number of amateur radio operators makes it imperative that licensees not intentionally interfere with each other's transmissions. Gilbert's behavior on March 18, 1981 did not constitute an isolated instance. He had caused such interference earlier; he had been requested not to do so in the future. Rather than comply with this request, he deliberately went on the air on March 18, 1981 and caused interference on 14.310 MHz.[13] His behavior is inexcusable and mandates revocation of the Station KB6TG license and suspension of his operator's license.

5. It must also be determined whether Gilbert wilfully violated 47 C.F.R. 97.119. For the reasons articulated, *infra*, it is concluded that

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[12] Gilbert's argument that there is no way for a person to be certain that his transmissions will not cause interference to others is not persuasive or relevant. The evidence establishes that Gilbert was informed that he was causing interference and persisted in doing so.

[13] Evidence regarding Gilbert's prior acts were received relative to a pattern of behavior and his intent.

there was such a wilful violation.[14] The vulgarities, sexually explicit terms and barnyard epithets used by Gilbert on March 18, 1981 are set forth in paragraph 12 of the findings and need not be repeated. The Commission, pursuant to Sections 1, 301 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 1, 301, 307, is responsible for insuring that its licensees operate authorized radio facilities consistent with the public interest. The Commission, in exercising this authority, adopted 47 C.F.R. 97.119, which prohibits the transmission in the amateur radio service of "communications containing obscene, indecent or profane words, language or meaning."[15] Whether the Commission's action in adopting 47 C.F.R. 97.119 was constitutionally permissible is a matter more appropriately determined by the Commission, the forum which adopted the rule. Therefore, no further discussion as to this question is necessary or appropriate.

6. Gilbert's transmissions, containing variations of the word "shit" as well as references to excretory organs and sexual activities were made during the time period 7:41 p.m. to 9:06 p.m. PST. Gilbert acknowledged that he would not use this type of language if women were listening. He also acknowledged that one does not know whether children are listening to amateur transmissions. It is concluded, under the facts of this case, that the language used by Gilbert was indecent within the meaning of *Pacifica*, cited, *supra*. The Supreme Court, noting that the normal definition of "indecent" merely refers to nonconformance with accepted standards of morality, observed that the requirement that indecent language be avoided has its primary effect on the form, rather than the content of serious communication.[16]

7. It is concluded that Gilbert wilfully violated 47 C.F.R. 97.119 of the rules.[17] It is not necessary to determine whether Gilbert's wilful violation

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[14] Gilbert's contention that he received no formal Notice of Violation regarding violation of 47 C.F.R. 97.119 and that the Commission is, as a result, precluded from proceeding on this charge is rejected. This violation was set forth in the Order to Show Cause. Additionally, while the official Notice of Violation did not cite 47 C.F.R. 97.119 violation, it did contain an "INTERCEPT" which contained the language in question and Gilbert in his response to the Notice made particular reference to his bad language (Bureau Exs. 2 and 3). It is ruled that Gilbert received adequate notice and that due process was served. *Eleven Ten Broadcasting Corp.*, 32 FCC 2d 706 (1962); aff'd *sub. nom. Immaculate Conception Church of Los Angeles v. FCC*, 116 U.S. App. D.C. 73, 74, 320 F 2d 795, 796 (1963); *cert denied*, 375 U.S. 904 (1963); *Arzona Mobile Telephone Company*, 80 FCC 2d 1, 10 (Rev. Bd. 1980).

[15] The U.S. Supreme Court has made clear that Section 326 of the Communications Act, 47 U.S.C. 326, which prohibits the Commission from censuring or interfering with the rights of free speech by means of radio communications, does not limit the Commission's authority to impose sanctions on licensees who engage in obscene, indecent or profane broadcasts. *F.C.C.* v. *Pacifica Foundation*, 438 U.S. 726, 738 (1978).

[16] The Court, in the *Pacifica* case, further noted that there are few, if any, thoughts that cannot be expressed by the use of less offensive language.

[17] See also *Eastern Education Radio*, 24 FCC 2d 408 (1970) and *Jonathan A. Banquer*, FCC 82D–36, released May 12, 1982.

of 47 C.F.R. 97.119 warrants concluding that he is not qualified to remain a Commission licensee. As emphasized, *supra*, the wilful violation of 47 C.F.R. 97.125, standing alone, mandates such an action.

8. The Presiding Judge agrees with the Bureau that Gilbert was lacking in candor when, in his response to the Official Notice of Violation, he represented that he was not aware that the Brown Sugar Net had been using the frequency on which he was charged with causing interference on March 18, 1981 (Bureau Exs. 2 and 3). The findings (paras. 19–21) establish that prior to March 18, 1981 Gilbert was well aware of the fact that this net operated on the frequency. However, the Presiding Judge does not agree with the Bureau that Gilbert's testimony was evasive and not credible. Nor does he agree that his lack of candor relative to his knowledge of the Brown Sugar Net, standing alone, warrants revocation of Gilbert's license. However, such lack of candor may be considered as supportive of the conclusion that the interference violation warrants revocation and suspension.

Accordingly, IT IS ORDERED that, unless an appeal from this Initial Decision is taken by a party or the Commission reviews this Initial Decision on its own motion, in accordance with the provisions of Section 1.276 of the Commission's Rules, Kenneth L. Gilbert's Amateur Radio Station license KB6TG IS REVOKED and his Amateur Advanced Class Radio Operator license IS SUSPENDED for the remainder of its term.[18]

FEDERAL COMMUNICATIONS COMMISSION

Thomas B. Fitzpatrick *Assistant Chief Administrative Law Judge*

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[18] The Secretary is directed to serve a copy of this Initial Decision by Certified Mail, Return Receipt Requested, on the respondent at the address listed in the caption. In the event exceptions are not filed *within 30 days of the release of this Initial Decision* and the Commission does not review this case on its own motion, this Initial Decision shall become effective 30 days after the public release, pursuant to 47 C.F.R. 1.276. Upon the effective date of this Initial Decision, the licensee shall forward to the Commission the revoked and suspended licenses. Operation of the amateur radio station specified above after the effective date of the license revocation is in violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. 301, and may subject any person operating such station to the penal sanctions specified in Section 501 of the Act, 47 U.S.C. 501.

Common Carrier, Accounting Rules
Common Carrier, Revenue Requirements
Expenses Operating
Litigation Expenses, Allowances

Inquiry into standards to be used in allowing or disallowing litigation expenses in common carrier ratemaking proceedings terminated. Existing treatment deemed adequate to protect the public interest. Need for change in accounting rules assigned to advisory group considering revisions to uniform system of accounts.
—*Litigation Expenses*
CC Docket No. 79–19

FCC 82–494

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Policy to be Followed in the Allowance of Litigation Expenses of Common Carriers in Ratemaking Proceedings	CC Docket No. 79–19
In the Matter of	
Revisions to the Uniform System of Accounts	CC Docket No. 78–196

MEMORANDUM OPINION AND ORDER

Adopted: November 4, 1982; Released: November 15, 1982

BY THE COMMISSION: COMMISSIONER FOGARTY ISSUING A SEPARATE STATEMENT; COMMISSIONER RIVERA ABSENT.

1. We have before us comments filed in response to a Notice of Inquiry, adopted February 14, 1979, into the policy to be followed in deciding whether and to what extent litigation expenses should be allowed as reasonable expenses in connection with common carrier rate proceed-

ings. *Common Carrier Litigation Expenses*, 70 FCC 2dc 1961 (1979) (the NOI). In initiating the NOI, the Commission noted that the recent increase in litigation expenses, especially in the antitrust area, could have a substantial effect on the rates charged by some of the carriers. Thus, there was a need to determine whether such sums should be charged to the ratepayers.

2. As discussed below, we find that the present ratemaking treatment of litigation expenses adequately protects the public interest and that no new policy need be implemented at this time. However, we shall assign to the Telecommunications Industry Advisory Group (TIAG) established by our Second Supplemental Notice of proposed Rulemaking in CC Docket No. 78–196, *Revisions to the Uniform System of Accounts*, 88 FCC 2d 83 (1981), the responsibility of determining whether and to what extent any change is necessary in the accounting or reporting of litigation expenses or settlements of antitrust lawsuits in order to facilitate ratemaking scrutiny of such expenses.

Background and Summary of Comments

3. The NOI divides litigation cases into four categories:

(1) Cases brought against the carrier seeking damages or other relief, often against the antitrust laws.

(2) Cases brought by the carrier against another carrier or a non-carrier seeking similar relief as in (1).

(3) Cases brought against the carrier by a Government agency.

(4) Appeals by the carrier of orders of this Commission.

Interested parties were invited to submit comments addressed to, but not limited to, the following questions:[1]

(1) To what extent are litigation expenses in each category used and useful, or reasonably necessary or ancillary to the provision of telecommunications services?

(2) To what extent does the statutory right of appeal of Commission decisions affect the reasonableness of charging the ratepayers with the expenses of such appeals?

(3) Should the allowance or disallowance of any or all litigation expenses be based upon the result of such litigation, *i.e.*, success or failure?

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[1] Comments were filed by American Telephone and Telegraph Company (AT&T), Robert L. Bingham (Bingham), Communications Satellite Corporation (Comsat), GTE Service Corporation (GTE), Theodore Lindsay (Lindsay), MCI Telecommunications Corporation (MCI), Miscellaneous Common Carriers (including United Video, Inc., United WEHCO, Inc., Laredo Microwave, Inc., Pilot Butte Transmission Company, Inc., Hi-Desert Microwave, Inc., Eastern Shore Communications Corp., East Texas Transmission Company), RCA Alaska Communications, Inc. (Alascom), The Public Service Commission of the State of New York (PSCNY), RCA Global Communications, Inc. (RCA Globcom), Telocator Network of America (Telecator), United States Independant Telephone Association (USITA), United Telecom Service, Inc. (United Telecom), Satellite Business Systems (SBS), and the Office of Consumers' Counsel, State of Ohio (OCCO). Reply comments were filed by RCA Globcom and MCI. An issue-by-issue summary of the comments is included as Appendix A hereto.

(4) If the answer to question 3 is affirmative, how should the Commission treat the expenses of litigation that does not go to veridct, *e.g.*, that is settled or voluntarily dismissed?

(5) What accounting changes are required in order to isolate those activities of staff employees which are connected with litigation from non-litigation connected activities of the same personnel?

(6) If any or all litigation expenses are allowed, should they be charged to the ratepayers in the year incurred or amortized over a longer period?

(7) To what extent and using what standards should the Commission consider whether the amounts claimed as expenses for specific litigation activities are reasonble or excessive?

4. The separate statement of former Chairman Ferris posed additional areas of inquiry: (1) whether and, if so, how the Commission would establish a definitional line separating allowed from non-allowed litigation expenses; (2) the potential disparate effect of any resulting policy on AT&T and on other (smaller) common carriers; (3) any possible encroachment on carrier First Amendment rights.

5. Since a complex summary of the comments, organized by issue, is set forth in Appendix A, only a brief review of the major arguments will be presented here. Most of the commenting parties believe the Commission should continue to adhere to its current treatment of litigation expenses, allowing expenses reasonably incurred in the ordinary course of a carrier's business.[2] They contend that such expenses should be allowed unless a particular challenged expense is found to be unreasonable or imprudent. They assert that existing procedures, which require carriers to justify challenged expenses in a rate case and permit the Commission to determine allowability on the basis of the record developed, amply protect the public interest.

6. Several basic reasons are advanced in support of the argument that our treatment of litigation expenses should not be changed. First, disallowance of such expenses would necessitate that shareholders pay for litigation. This would reduce shareholder return levels and add more risk to investor capital. As a result, the cost of capital (in higher investor requirements) would increase, leading to a higher rate of return. Therefore, ratepayers would pay for the higher return required. Thus, it is argued, nothing would be gained by disallowing ratepayer respnsibility for the expense item. Second, litigation expenses are ordinary business expenses, and existing ratemaking treatment is adequate to identify specific challenged expenses for or disallowance. Third, closer scrutiny of

[2] AT&T, Comsat, GTE, Miscellaneous Common Carriers, Alascom, RCA Globcom, USITA, and United Telecom. SBS feels the established practice is preferable, at least as applied to competitive carriers. OCCO also allows such expenses unless their total is abnormal for the test period in comparison to historic litigation expenses.

expenses incurred and greater reporting requirements would increase regulation and would be contrary to the general policy of deregulation. Such added regulation would in turn encourage more litigation as to the nature, classification and amount of particular expenses. Fourth, inquiry into the reasonableness of specific legal expenses would inject the Commission into managerial decision-making. Litigation decisions are complex matters requiring intimate knowledge of the facts of each case and the carrier's litigation position. Due to the complexity of litigation and the duration of most lawsuits, it is extremely difficult to judge the reasonableness of litigation expenses, especially by persons not involved in the day-to-day management of the carrier. Judgments as to the reasonableness of litigation expenses can therefore only be made on a case-by-case basis. Since these expenses are important from a ratemaking standpoint only in a given test year, it is unnecessary that there be continual scrutiny of these expenditures. Fifth, any increase in regulatory requirements, such as accounting, would result in increased carrier and FCC expense. Sixth, most litigation is undertaken or pursued reasonably and in good faith; failure does not mean that the lawsuit was frivolous or without merit or that a carrier's defense was unfounded. Further, there is no general rule against which litigation can be judged as reasonable or unreasonable. The facts of the specific case must be considered. A policy of disallowance might deter meritorious litigation and appeals and might encourage parties to bring lawsuits against carriers, since a carrier might be less likely to defend or more likely to settle.

7. Three of the commenting parties favor a change in the existing treatment of litigation expenses accorded to monopoly carriers in order to prevent cross-subsidization of litigation involving competitive services.[3] These parties argue, first, that blanket allowance of such expenses permits monopoly carriers to undertake litigation at no cost. To the extent monopoly carriers can charge such expenses to their monopoly services rather than to their competitive services, and competitive carriers must charge them only to competitive services, monopoly carriers have a competitive advantage. The ability of monopoly carriers to charge these

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[3] Bingham, MCI and Telocator. In addition, Lindsay suggests that carrier-antitrust plaintiffs should pay their own litigation costs because plaintiffs decide whether to bring suit and are more likely to serve shareholder interests. He also recommends that the FCC either disallow appeal costs or ask the reviewing court to decide whether such costs should be allowed. PSCNY has advised that it disallowed half of the costs incurred by New York Telephone as a result of the antitrust litigation brought by the Justice Department against AT&T. The state commission reasoned that a question existed as to whether the present Bell System structure benefitted ratepayers and, therefore, whether the legal expenses in defense of the suit benefitted ratepayers. It disallowed on half of the expenses on the theory that settlement of the suit was likely and that uncertainty would remain as to whether the expenses were incurred for utility purposes. On appeal, the court found that the PSCNY had authority to disallow legal expenses incurred for non-utility purposes and upheld it action. New York Telephone Co. v. Public Service Commission, 410 N.Y. Supp. 2d 124 (1978).

expenses to the monopoly service ratepayer results in the potential for anti-competitive cross-subsidization. When such expenditures are uncontrolled and are routinely allowed, monopoly carriers have no incentive to minimize such expenses. Second, it is contended that automatic allowance of litigation expenses insures shareholders against defeat and does not provide a check against management misdeeds or errors in judgment.

8. To deal with this potential for cross-subsidization by monopoly carriers, Bingham recommends disallowance of litigation costs involving a monopoly carrier's competitive services. MCI and Telocator suggest modifications to the present treatment of litigation expenses, although not along the lines set out for comment in the NOI. MCI suggests that the Commission require detailed reporting by monopoly carriers, with disallowance of specific expenditures based upon analysis of ratepayer benefit. Telocator urges the Commission to require assignment of AT&T's legal expenses in the competitive area to the appropriate competitive service category.

Discussion

9. In determining whether to implement a policy of allowance or disallowance of litigation expenses in ratemaking proceedings, we are mindful of judicial ratemaking standards, among them that regulatory commissions should "give heed to all legitimate expenses that will be charges upon income during the term of regulation." *West Ohio Gas Co. v. Public Utilities Commission of Ohio*, 294 U.S. 63, 74 (1934). While the Commission regulates rates, it does not manage the carrier's business. Good faith is presumed on the part of a carrier's management, and it has been stated that public utility commissions should not substitute their judgments as to the reasonableness of expenses in the absence of a showing of inefficiency or improvidence. *See Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276, 288–89 (1922); *West Ohio Gas Co. v. Public Utilities Commission of Ohio, supra. Monroe Gaslight and Fuel Co. v. Michigan Public Utilities Commission*, 11 F.2d 319, 325 (E.D. Mich 1926). Generally, in determining rate of return, public service commissions must consider the sum required by the utility to meet its operating expenses. They may disallow expenses actually incurred in the company's operation where the challenged expense is found to be exorbitant, unnecessary, wasteful, extravagant, or incurred in the abuse of discretion or in bad faith, or of a non-recurring nature. *Alabama Public Service Commission v. Southern Bell Telephone and Telegraph Co.*, 42 So. 2d 655 (1949). *See also AT&T* (Docket No. 19129), 64 FCC 2d 1, 85–86 (1977) and *Communications Satellite Corporation* (Docket No. 16070), 56 FCC 2d 1101, 1174–75 (1975). Pursuant to provisions of the Communications Act of 1934, as amended, a carrier has the burden of establishing the reasonableness of its operating expenses

and must support inclusion of any challened expenditure. *See* 47 U.S.C. § 204(a) and 220(c). Thus, under existing ratemaking treatment a carrier can charge ordinary operating expenses incurred in its provision of utility service to the consumer but must justify as reasonable any questioned expenditure.[4]

10. The Commission currently can review expenses in individual tariff investigations, as well as in rate base and expense proceedings. AT&T does not have a blanket authorization to assign costs in an improper manner. We believe that the tariff and rate case review mechanisms are the suitable forums for challenging the appropriateness of particular expenses.

11. The Commission already possesses means under existing rules to adequately meet any need for data as to a carrier's litigation expenses on an *ad hoc* basis. Sections 215, 218 220 and 403 of the Communications Act, 47 USC § § 215, 218, 220 and 403, grant broad authority to the Commission to require the production of any and all relevant information. Further, the detailed reporting of litigation expenses by monopoly carriers, a tool advocated by MCI for determining allowance, has already been implemented to a great extent by AT&T. By letter of Dec. 18, 1974, AT&T was requested to establish subaccounts under Account 664, 47 CFR 31.664, for the purpose of identifying and segregating costs relating to the antitrust suit filed by the Department of Justice.[5] On June 21, 1976, AT&T was similarly requested to establish and maintain an accounting of all expenses incurred in defense against the Litton Industries, Inc. antitrust suit.[6] AT&T has filed quarterly reports for both antitrust suits. On June 26, 1980, AT&T was further directed to develop a keep cost system to capture costs and any allocation of expenses for all antitrust suits. The purpose is to ensure that all such expenses are separately identified and maintained, for subsequent determinations as to whether such costs are properly chargeable to ratepayers or to shareholders. In addition, AT&T

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[4] Review of recent reported state commission decisions regarding ratemaking treatment of antitrust legal expenses reveals that the treatment of such expenses has been varied and inconsistent and has generally turned upon the facts of each case and not upon a rule or policy of allowance. For example, specific claimed litigation expenses have been disallowed in Colorado, *Re Mountain States Telephone and Telegraph Company*, 39 PUR 4th 222 (1980), Minnesota, *Re Northwestern Bell Telephone Company*, 36 PUR 4th 283 (1980), and Washington, *Washington Utilities and Transportation Commission v. Pacific Northwest Bell Telephone Co.*, 26 PUR 4th 495 (1978). Such expenses have been allowed in whole or part in the District of columbia, *Re Chesapeake and Potomac Telephone Company*, 43 PUR 4th 169 (1981), Missouri, *Re Southwestern Bell Telephone Company*, 45 PUR 4th 73 (1981), North Carolina, *Re Southern Bell Telephone and Telegraph Company*, 42 PUR 4th 18 (1981), New York, Re New York Telephone Company, 32 PUR 4th 353 (1979), and Washington, *Washington Utilities and Transportation Commission v. Pacific Northwestern Bell Telephone Co.*, 39 PUR 4TH 126 (1980). These state cases do not provide any general principles which we believe could be used to form the basis of a federal policy of allowance or disallowance.

[5] U.S. v. AT&T, No. 74–1698 (D.D.C.)

[6] Litton v. AT&T, No. 76 Civ. 2512 (S.D.N.Y.).

is to advise the Commission of its accounting treatment upon settlement of any suit.[7] In response, AT&T initiated a specific cost record keeping system throughout the Bell System, on a forward-looking basis beginning July 1, 1980, to capture and maintain records of each antitrust suit's cost and any allocation of expenses for each antitrust suit. For the period January 1, 1975 to June 30, 1980, AT&T has also identified and accumulated costs incurred for an individual case and has allocated generic costs among the cases in proportion to outside counsel fees. *See* Letter to Acting Chief, ACcounting and Audits Division from William R. Stump, Assistant Vice President, AT&T, dated June 24, 1981. Thus, there is no present need for imposition of more universal detailed reporting requirements in this area, especially in light of the added cost of compiling this data and the greater burden imposed upon the Commission in assuring compliance.

12. We are currently undergoing a comprehensive review of our accounting rules in CC Docket 78–196 (REvisions to the USOA). Instead of reviewing this one particular expense item separately, we believe the better course of action is to assign to the TIAG the responsibility of determining whether more detailed accounts or formal reports are needed to support analysis of litigation expense in a rate case. If so, the TIAG should develop the necessary accounts, definitions, and accounting rules for litigation expenditures. We established this advisory group to develop, prepare, and submit a proposal for a basic framework and content of a revised USOA. The membership of the group represents a balanced cross-section of points of view. It currently has over 40 members representing all segments of the telephone industry, including regulators, independent carriers, equipment manufacturers, other common carriers, AT&T, the American Institute of Certified Public Accountants, consumers and large users.

Conclusion

13. The commenting parties note that the recent increase in litigation costs does not mean that carriers are litigating imprudently, but may

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[7] AT&T has asserted that, because lawsuits are part of the ongoing operations of the business, it will report settlements of damage claims under litigation or outside of litigation in Account 669, 47 CFR 31.669 (Accidents and damages). *See* Letter to A. J. Lipske, Chief, Accounting and Audits Division, from William R. Stump, Assistant Vice President, AT&T, dated August 5, 1980. Account 669 includes expenses . . . "on account of persons killed or injured and property of others damaged in connection with the company's telephone operations" and, specifically, amounts paid in settlement of personal injury or damage claims. Settlements of antitrust suits are not specifically mentioned as falling within Account 669. Because it is unclear whether this account should include settlements of antitrust suits, we will instruct the TIAG involved in revisions to the USOA to consider this issue. However, we note that penalties and fines paid on account of violations of statutes would be reported in Account 370 (Extraordinary income charges), 47 CFR 31.370, containing nonrecurring costs which are not includable for rate purposes.

merely reflect the greater tendency of the country as a whole to litigate disputes, including those arising from the Commissiion's procompetitive policies. We believe that the current ratemaking treatment is adequate protection against unreasonable litigation spending. Consistent with our discussion above, we terminate this proceeding with instruction to the TIAG to consider whether and to what extent any increased or more detailed formal reporting is necessary to facilitate review of challenged litigation expenses in a rate case and to consider the accounting and reporting of settlements of antitrust lawsuits consistent with this order.

14. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 205 and 403 of the Communications Act of 1934, as amended, 47 USC § 154(i), 154(j), 201, 205 and 403, that the inquiry into the policy to be followed in connection with treatment of litigation expenses for ratemaking purposes, CC Docket No. 79–19, IS TERMINATED.

15. IT IS FURTHER ORDERED, That the Telecommunications Industry Advisory Group established by the *Second Supplemental Notice of Proposed Rulemaking and Order* in CC Docket 78–196, 88 FCC 2d 83 (1981), IS ASSIGNED the task of determining the need for separate accounts, definitions, and rules pertaining to accounting for the reporting of litigation expenses and amounts in settlement of antitrust lawsuits.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

Appendix A
Summary of the Comments by Issue

Issue 1

To what extent are litigation expenses in each of the categories listed below used and useful, or reasonably necessary or ancillary to the provision of telecommunications services?

The litigation to be considered in this proceeding can be divided into four categories:

1. Cases brought against the carrier seeking damages or other relief, often under the antitrust laws.

2. Cases brought by the carrier against another carrier or a non-carrier seeking similar relief as in (1).

3. Cases brought against the carrier by a Government agency, such as the Department of Justice, Department of Defense, or this Commission.

4. Appeals by the carrier of orders of this Commision.

Comments should also address what standard (e.g., "necessary and reasonable," "ordinary and necessary," "used and useful," etc.) should apply to determining the appropriate treatment of litigation expenses.

1. Most of the commenting parties urge that litigation expenses should continue to be allowed as ordinary and necessary costs of doing business. (*See* comments of AT&T, Comsat, GTE, Miscellaneous Carries, Alascom, RCA Globcom, United Telecom, and USITA). RCA Globcom states that no rule of general applicability will assist in determining the reasonableness of such expenses, asserting that such determinations must be made on a case-by-case

basis. It asserts that litigation expenses are essential to the provision of telecommunications service in a competitive environment and that a decision to insur such expenses is a decision for the carrier's management.

2. GTE, USITA, Alascom, and AT&T generally agree with RCA Globcom's position. GTE asserts that the Commission should adhere to its present approach, allowing litigation expenses subject to challenge in a ratecase. Once challenged, a full record is developed as to the propriety of the expense based upon the facts of each case, upon which the Commission determines whether or not the expense is allowable. GTE further states that a general policy as to litigation expenses will not serve the public interest; allowance or disallowance cannot be determined without a full record as to the facts surrounding a particular challenged expense.

3. USITA asserts that the decision as to whether litigation expenses are allowable should continue to depend upon whether they are reasonably incurred in the ordinary course of the carrier's business, and it emphasizes that the treatment of such expenses is only of importance to rate proceedings and is not a matter for daily regulatory concern. It further asserts that reasonable litigation expenses will have minimal impact on revenue requirements and that only extraordinary expenses should be closely scrutinized. USITA is also in agreement with the necessity for case-by-case determinations which take into account the subject matter of the litigation, the amounts involved, and the relation to the carrier's business.

4. AT&T concurs that litigation expenses are ordinary business expenses incurred in the exercise of management's judgment, for whom the FCC may not substitute its judgment. AT&T adheres to the necessity for case-by-case determinations, asserting that the Commission may disallow the expense only if it is found to be the result of an imprudent or unreasonable act or is unrelated to the business being regulated. It claims that reasonableness can be determined only in light of conditions in existence at the time of management's decision, which should be respected unless facts are produced which call that decision into question. AT&T believes that the four categories of litigation should be treated uniformly under this reasonableness standard.

5. Alascom also asserts that there is no category of litigation in which carries are involved which is not legitimate or prudent and states that individual exceptions must be examined on an individual basis. Alascom contends that no special policy need be formulated for competitive carriers because competitive conditions control their rates of return. As to monopoly carriers, Alascom asserts that if litigation expenses are not included in the rate base, they must be added to the return necessary to meet the carrier's service obligations. In any event, says Alascom, it would be intolerable to adopt a rule which would pressure carriers not to bring or defend well-founded actions. The Miscellaneous Carriers agree that litigation expenses must continue to be permitted, but request that small video carriers be exempted from any expense limitation which is imposed.

6. Comsat adheres to the general view that current regulations are adequate and allow protection against imprudent or unecessary expenses. It states that the focus of which expenses are useful or unreasonable necessary to provide service should depend upon the subject matter of the particular litigation and not upon the carrier's posture as defendant, plaintiff or appellant.

7. SBS asserts that litigation expenses of competitive service carriers are controlled by market forces which provide a check against potential abuses regarding the incurring of excessive expenses. SBS suggests that the Commission direct its concern to the propriety of expenses claimed by carriers furnishing non-competitive services.

8. Lindsay is the only commenting party to advocate allowance or disallowance based upon the categories of litigation. He contends that carrier antitrust defendants should be allowed to charge litigation expenses to ratepayers, upon the rationale that the expenses are necessary to a litigation which aids in defining industry structure, and that the defendant carrier cannot control the process and must generally represent ratepayer interests. Plaintiff antitrust expenses, on the other hand, should not be allowed, since plaintiffs act on

behalf of shareholders and since disallowance will act as an incentive to minimize use of litigation as a marketing strategy. Should plaintiff win, says Lindsay, they may be awarded treble damages and attorney's fees. Ratepayers should not insure plaintiff carriers against defeat. As to carrier appellants from Commission decisions, Lindsay suggests that appeal expenses either be disallowed by the Commission, or that the reviewing court be asked to determine allowability. This is because ratepayers should not have to bear both the higher rates and the costs of achieving higher rates, especially since ratepayer interest is represented by the agency. Disallowance does not reach constitutional dimensions, Lindsay asserts, because carriers are not indigents who must receive aid to access the courts. Disallowance will not eliminate meritorious appeals, however, since the stakes are greater than appeal costs. Lindsay mentions numerous other options, such as (a) disallowance of ratecase expense before both agency and appellate court (again upon the rationale that costs incident to increasing rates should not also be imposed on ratepayers), (b) allowance of reasonable agency expenses, with disallowance where misconduct such as bad faith or unnecessary delay is shown, (c) disallowance of costs of unsuccessful appeals (since this is optional and puts a disincentive on automatic appeals) or (d) allowance of appeal costs, unless the appeal is frivolous.

9. Bingham asserts that, if the litigation concerns that portion of the carrier's business in which there is competition with other carriers, such expenses should not be included in the ratebase.

10. Telocator suggests that litigation expenses be treated on a service allocation basis. Telocator would require AT&T to account for litigation expenses in the competitive area as part of the cost of its competitive services and thus to charge them to the competitive service ratepayer. This approach is asserted to be necessary in order to avoid alleged anti-competitive cross-subsidization engaged in by AT&T, upon the following rationale: (a) competitive carriers must allocate expenses to competitive services, (b) if competitive carriers litigate improvidently, the profitability of their operations is adversely affected. The marketplace thus forces competitive carriers to litigate prudently, (c) AT&T, on the other hand, incurs expenses and charges them to monopoly service ratepayers. The expenses of litigation in the competitive area are being subsidized by the carrier's monopoly services, which is anti-competitive, (d) if costs must be service allocated, says Telocator, AT&T will be more likely to undertake a cost/benefit analysis prior to litigation, as competitive carriers do. Marketplace forces would then curb improvident litigation, putting AT&T on an equal footing with competitiors. Telecator asserts that this allocation approach would also assure that services reflect their associated costs, providing for just and reasonable rates.

11. MCI suggests a monopoly carrier reporting requirement. It asserts that the Commission should examine substantial and significant expenses in all categories in order to determine which expenses are necessary and prudent in the public interest, in the following manner: (a) The Commission should require annual detailed reporting of litigation expenses of monopoly carriers, (b) The Commission should then determine whether such expenses are consistent with the public interest, convenience, or necessity by looking to the origin of the litigation, its purpose, and outcome, (c) The Commissiion should allow inclusion only of amounts determined to have been legitimately and prudently incurred in the ratepayers' interest, and (d) make explicit findings for disallowance. MCI further suggests that the policy adopted be enlarged to include administrative proceedings and a consideration of who should pay for judgments rendered against a carrier. Allowance should be determined, MCI continues, in accordance with a standard that includes an analysis of the purpose and/or effect of the litigation, and suggests that an anticompetitive purpose or effect would not satisfy the standard for allowance.

12. OCCO submitted a study which reflects current treatment of ratecase and litigation expenses by ohio, and a limited survey of state commission treatment. In Ohio, ratecase expenses are allowed, within the following guidelines: (a) current ratecase expenses should be consistent with historical ratecase expenses and those of similar size utilities; (b)

amortization periods are based upon historical time between rate filings, or those projected; (c) one year's amortization is included in the cost of service. Litigation expenses (defined as legal services supplied by persons who are not in the regular employ of the utility) are generally allowed, unless the total of such expenses is abnormal for the test period in comparison to historical litigation expenses. The Ohio survey of chosen state and federal agency treatment revealed that litigation expenses are generally allowed, although the Federal Energy Regulatory Commission would disallow suits filed by a company invoving a supplier's inability to fulfill a contractual agreement. Kansas challenges expenses incurred in frivolous appeals. Virginia disallows questionable expenses, and New Jersey disallows all such expenses. The Ohio study also sets forth arguments made for inclusion or disallowance. Arguments for inclusion of litigation expenses are that a company has a legal right to appeal, and that even lack of success does not render suit frivolous; against inclusion, that ratepayers should not pay for management errors in judgment. PSCNY states that it has recently disallowed one half of the costs of an antitrust defense, which decision was affirmed with denial of leave to appeal.

Issue 2

To what extent does the statutory right of appeal of Commission decisions affect the reasonableness of charging the ratepayers with the expenses of such appeals?

13. Of the parties who commented on this issue, United Telecom, RCA Globcom, Alascom, Comsat and AT&T concur that appeal costs should be allowed. United Telecom asserts that the statutory right of appeal should not affect the reasonableness of charging costs to the ratepayer, since everyone has the right to appeal. RCA Glolbcom alleges that, if the Commission can penalize a carrier for availing itself of its statutory right of appeal, the scheme which provides for that right is frustrated. Further, it states that such appeals are a necessary business expense of a regulated carrier. Alascom asserts that any action discouraging carrier review of Commission decisions is contrary to the public interest. Comsat states that the statutory right of appeal implies that litigation expenses incident thereto should be allowed. AT&T urges that expenses associated with appeals of Commission decisions are proper because the FCC has not always been upheld and the Commission's actions thus cannot be presumed to be correct, and because disallowance would chill rights to judicial review and would insulate and enhance the agency's power, contrary to the public interest.

14. GTE is of the opinion that the statutory right of appeal has no bearing on whether litigation expenses are properly charged to ratepayers and that regard must be made to the facts of each case.

15. MCI asserts that the fact that a monopoly carrier has a statutory right of appeal does not justify imposing those costs on ratepayers. It states that

> Congress conferred such appellate rights only for the protection of the carrier's legitimate interests in litigation which comports with the public interest. It certainly did not intend to make a blanket authorization for imposing on a carrier's ratepayers the costs of all such apeals, no matter how imprudent or predatory.

MCI Comments, pp. 16–17.

Issue 3

Should the allowance or disallowance of any or all litigation expenses be based upon the result of such litigation, i.e. success or failure?

and

Issue 4

If allowance or disallowance of any or all litigation expenses should be based upon the result of such litigation, how should the Commission treat the expenses of litigation that does not go to verdict, e.g., that is settled or voluntarily dismissed?

16. Of the parties who addressed these issues, only MCI asserts that the outcome of the proceeding should be considered, although not the sole consideration, in determining whether the litigation expense was consistent with the public interest, convenience or necessity.

17. AT&T, United Telecom, and GTE concur that such a standard is inequitable and incapable of mechanical application. AT&T cites four problems with such a standard: (1) Where liability is clear, but the damages claimed are exaggerated or an improper remedy is sought, litigation is essential, (2) Where both liability and appropriate relief are unclear, or where liability only is unclear, litigation is necessary to protect against service degradation and higher costs of service, (3) The defendant may be victorious, even if found liable to some extent, if it has successfully fought off a more adverse judgment, and (4) Success or failure may therefore be measured not by reference to the judgment rendered, but upon a risk/benefit analysis. United Telecom similarly urges that the outcome standard is inequitable, since it does not relate to the reasonableness of the expense or the benefit to the customer. Further, United Telecom asserts that this standard is not as simple to apply as it seems, citing as example that if a carrier is sued for a large amount, defends, and judgment is entered for a small amount, most would consider the defense a success, although it is technically a failure. United Telecom adds that a hard and fast rule will unduly influence management decision-making and the judicial process, contending that courts would not smile upon a rule that discouraged settlements. GTE urges that losing a case does not mean that it was brought improvidently. It alleges that serious problems would arise in utilizing this approach, since there is no clear-cut victory or defeat in complex litigation, and since the form of the result might delay settlement, which works against the public interest.

18. Comsat reiterates that the subject matter of the litigation and its relation to the provision of service should be determinative, not the outcome. It alleges that the fact that the carrier is unsuccessful does not negate the reasonableness of the effort or the potential ratepayer benefit.

Issue 5

What accounting changes are required in order to isolate those activities of staff employees which are connected with litigation from non-litigation connected activities of the same personnel?

19. Comsat, United Telecom, and GTE assert that current accounting rules are adequate and that accounting changes are not required. United Telecom states that isolation of staff litigation activities could be accomplished in its present account.

20. AT&T and RCA Globcom agree that it is possible to develop a cost reporting system, but that such will constitute significant new elements of cost leading to higher rates. AT&T repeats its allegation that the reasonableness of each expense must be determined on a case-by-case basis. To account on this basis, AT&T contends, would require a revised accounting system by function, time, and case. Because all lawsuits are not controversial from a ratemaking standpoint, it urges that detailed accounting would be unnecessary and costly.

21. MCI alone urges that monopoly carriers should be required to set up accounts so as to earmark litigation expenses, as part of its suggestion that such carriers report litigation expenses in detail.

Issue 6

If any or all litigation expenses are allowed, should they be charged to the ratepayers in the year incurred or amortized over a longer period?

22. Comsat, United Telecom, AT&T, and MCI concur that litigation expenses should be expensed in the year incurred. Comsat chooses this method on the basis that litigation expenses are current general expenses and not capital items. United Telecom asserts that the expenses should be charged in the year incurred since one cannot tell how long a lawsuit may last, and amortization might result in large costs in the year charged. AT&T states that, if litigation expenses were to be capitalized and then amortized, the value of the unamortized costs should become part of the investment base as to which shareholders would be entitled to a return. MCI asserts that it might be best to charge expenses to the ratepayer in the year incurred, if they appear proper, and then to shift the costs to the shareholders if the outcome is unfavorable and it appears that the purpose and effect of the litigation was anti-competitive or improper. MCI suggests that, as an exception, antitrust defense expenses should be charged to the shareholders as incurred and shifted to the ratepayer only if and when the carrier wins.

Separate Statement
of
Commissioner Joseph R. Fogarty

In Re: Reporting Lobbying Expenses by Regulated Carriers (CC Docket No. 78–373); Revisions to the Uniform System of Accounts (CC Docket No. 78–196)

and

Policy to be Followed in the Allowance of Litigation Expenses of Common Carriers in Ratemaking Proceedings (CC Docket No. 79–19); Revisions to the Uniform System of Accounts (CC Docket 78–196).

While I recognize that both carrier lobbying and litigation expenses are potentially significant rate base items warranting Commission scrutiny, I strongly agree with these decisions that the appropriate vehicle for reexamining and recommending possible changes or refinements in the reporting and accounting rules applicable to these expenses is the Telecommunications Industry Advisory Group (TIAG) which the Commission established upon my recommendation in CC Docket No. 78–196, 88 FCC 2d 83 (1981). TIAG's analysis and recommendations with regard to revising the Uniform System of Accounts will have the great value of representing the views of all affected interests—regulators, carriers, and the user public—on these critical and difficult issues. TIAG's recommendations will, of course, be subject to full Commission review and approval. In the interim, the Commission retains its full authority to review and pass upon lobbying and litigation expenses in particular carrier ratemaking or tariff proceedings.

Common Carrier, Accounting Regulations
Rule making, Petition for, Denied

Petition for rule making denied. Petitioner did not present evidence indicating current method of reporting lobbying expenses adversely affected interstate rates. Commission will reassess lobbying expenses within context of general review and redrafting of accounting rules.

—*Lobbying Expenses*
CC Docket No. 78–373

FCC 82–493

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Reporting Lobbying Expenses By Regulated Carriers	CC Docket No. 78–373
In the Matter of Revisions To The Uniform System Of Accounts	CC Docket No. 78–196

MEMORANDUM OPINION AND ORDER

Adopted: November 4, 1982; Released: November 15, 1982

BY THE COMMISSION: COMMISSIONER FOGARTY ISSUING A SEPARATE STATEMENT; COMMISSIONER DAWSON DISSENTING; COMMISSIONER RIVERA ABSENT.

1. We have before us comments filed in response to a *Notice of Inquiry* issued November 30, 1978, 70 FCC 2d 1136. The *Notice of Inquiry* was

prompted by a Petition for Rulemaking (RM 2875) filed on April 1, 1977 by Common Cause, a citizens' lobbying organization. Common Cause asked the Commission to issue rules requiring detailed periodic reporting by regulated communications carriers of monies spent to "lobby" public officials. As discussed below, we deny the petition to issue such rules at this time. However, we assign to the Telecommunications Industry Advisory Group established by our Second Supplemental Notice of Proposed Rulemaking in CC Docket No. 78–196, *Revisions to the Uniform System of Accounts*, 88 FCC 2d 83 (1981), the responsibility of developing necessary accounts and accounting rules for expenditures made for lobbying purposes.

Background

2. In its petition, Common Cause urges adoption of a regulation which would require carriers regulated by this Commission to file quarterly reports disclosing all expenses made for the purposes of attempting to influence federal, state and local legislation and the decisions of federal, state and local agencies plus all political contributions and other expenditures made to benefit any elected or appointed official or employee of a federal, state or local government. Under this proposal, the carriers would be required to report not only the direct costs of the lobbying effort but also the indirect costs of the underlying support effort. Specifically, Common Cause would have us require the carriers to report:

a. Salaries, travel and expenses of the employees who directly contact officials to influence legislation or decisions.

b. Cost of preparing, printing, and mailing statements or pamphlets urging support or opposition of matters pending before legislative or administrative agencies, including the salaries, travel, and other expenses of employees who prepare, distribute, or promulgate this material.

c. Cost of media advertising, meetings, speeches or fees to consultants for promoting or opposing legislative or administrative actions.

d. Cost of preparing testimony and testifying before legislative bodies in connection with pending matters.

e. Cost of participation in rulemakings, adjudications, or other proceedings before executive or administrative agencies, including salaries and other expenses of the employees involved, and fees paid to law firms or attorneys for such participation.

f. Salaries, travel and other expenses of employees who, while not assigned solely to lobbying efforts, incur such expenses on behalf of it.

g. Identification of the legislation or executive actions and the officials involved for which the expenses were incurred.

h. Expenditures, gifts, honoraria, or political contributions made by the regulated carrier or anyone acting in its behalf to benefit an elected or appointed official or employee of federal, state or local government. If the amount expended is over $10,

then the carrier must specify the beneficiary, date, amount and the circumstances surrounding the expenditure.

3. In response to this petition, we issued a Notice of Inquiry inviting interested parties to submit comments addressing the questions raised by the petition including:

a. Appropriate definition of lobbying expenses.

b. Extent of the information carriers should be required to report.

c. Whether the Commission has jurisdiction to require the reporting of expenses incurred in lobbying at the state and local level.

d. Whether the carriers' First Amendment right of free speech would be infringed by this reporting requirement.

e. Whether the costs of complying with the regulation would outweigh the benefits to the public.

f. Whether the existing reporting requirements at the federal, state, and local level could or should be integrated with any Commission ruling on this matter.

We received 14 formal comments[1] plus additional informal comments. Not all issues were addressed by the parties. Particularly lacking was a quantitative analysis of the cost/benefit relationship of the regulation proposed by Common Cause. Of the formal comments received, only those of MCI and Media Access Project supported the aim of the Common Cause proposal but they provided no substantive basis for adoption of the proposal. The others generally expressed the opinions that the added cost of compliance would outweigh the benefit; the definition of lobbying proposed by Common Cause is overbroad; and expenses incurred in providing information to administrative agencies and legislative bodies, especially when such information is required by statute or requested by that body, are legitimate costs of doing business and not lobbying.

Discussion

4. After full consideration of information submitted in response to our notice of inquiry, we find that initiation of the rulemaking proceeding requested in the Common Cause petition would not be in the public interest. Common Cause has presented no factual basis to show that lobbying expenses have resulted in increased charges for service. We believe that, based on past experience, even a total disallowance of lobbying expenses would have a *de minimis* effect on interstate rates.

Definition of Lobbying

5. We are concerned that the definition of lobbying proposed by Common Cause is overbroad and unworkable. It assumes that all carrier

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[1] Satellite Business Systems, United States Independent Telephone Association, General Telephone and Electronics, RCA Global Communications, United Telecom Services, Communications Satellite Corp., Comsat General Corp., Continental Telephone Companies, a group of miscellaneous common carriers consisting of Andrews Tower Rental, Inc., East Texas Transmission Company, Hi-Desert Microwave, Inc., Laredo Microwave, Inc., Pilot Butte Transmission Company, Inc., United Video, Inc. and United WEHCO, Inc., MCI Telecommunications, Inc., American Telephone and Telegraph Co., the Media Access Project, and Common Cause.

contact with legislative or regulatory bodies is "lobbying" in its accepted sense. We cannot accept the notion that all carrier appearances are made solely for the benefit of the carrier and its shareholders. In fact, much carrier presence before legislative or regulatory bodies is not volitional. It is either requested or required by statute.

6. The Common Cause proposal would require us to adopt a definition of lobbying that would transcend its historical and commonly accepted meaning.[2] Appearances before legislative and administrative bodies have generally not been viewed as lobbying. *See, e.g., Southwest Electric Power Co. v. U.S.*, 312 F. 2d 437, 444–45 (U.S. Ct. Cl. 1963). Many such appearances are to provide information, an activity which is in the public interest regardless of whether or not legislation results.

7. Furthermore, even though the Federal Energy Regulatory Commission and the Civil Aeronautics Board have adopted accounts to segregate lobbying expenses, both agencies have defined lobbying as expenditures for the purpose of influencing public opinion or the decisions of public officials. They have exempted expenditures which directly relate to appearances before regulatory or other governmental bodies in connection with the reporting company's existing or proposed operations. Even the Internal Revenue Code of 1954, 26 USC § 162(e), does not define as lobbying appearances, statements and communications to or before committees or members of Congress or state or local legislative bodies when they relate to legislation or proposed legislation which is of direct interest to the taxpayers.

8. Thus, we do not believe at this time that we should expand the definition of lobbying as proposed by Common Cause. To do so would require us to impose a scope of review on the activities of communications carriers far broader than that imposed on other businesses and industries.

Additional Reporting Requirements

9. Common Cause has not demonstrated a need at this time for a more detailed reporting of lobbying expenses. Moreover, even if this need existed, we are not convinced tht the value of the information gained would be worth the cost to the ratepayers of obtaining it. Besides the additional burdens on the carriers of compiling this data,[3] the Commis-

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[2] *Webster's New Collegiate Dictionary* (15th edition 1975) defines lobbying as conducting activities aimed at influencing public officials, especially individual members of a legislative body, on legislation.

[3] In addition to the direct cost of compiling the report, significant collateral expenses could be incurred by a carrier in examining each expense under the primary beneficiary test proposed by Common Cause. When a carrier's participation is requested by a decisionmaking body, it is extremely difficult to identify the primary beneficiary. For example, items that are prepared as intracarrier analyses are sometimes used in responses to governmental inquiries, and the primary beneficiary of the expense incurred in the preparation of a particular document is not readily apparent.

sion would be obligated to expend considerable resources to collect, store and analyze data on these expenses which in the past have had an insignificant impact on interstate rates.

10. The reporting of lobbying expenses would serve three general purposes: (1) general oversight of business conduct as it relates to governmental affairs: (2) recognition and control of carrier expenditures as a means of protecting ratepayers; and (3) production of information for special studies or investigations. However, specific means to satisfy each of these requirements either already exist or are currently being contemplated in proceedings and deliberations before this Commission and in Congress. Any action at this time to establish additional or alternative reporting standards would be duplicative.

11. The Commission already has the authority to determine whether outlays made by a carrier are for the benefit of the ratepayers and are properly included in the rate base and expense calculations for ratemaking purposes. 47 U.S.C. § 201(b). The principal function of our accounting rules is to facilitate this task. CC Docket 78–196, *Revisions to the USOA*, was established, in part, to improve the utility of the carriers' reports to the Commission. About rulemaking, such as that proposed by Common Cause, would be duplicative and unnecessary as a means of protecting the ratepayer. Moreover, the Commission already possesses sufficient means under existing rules to meet any need for this data in the interim on an *ad hoc* basis. Sections 215, 218, 220 and 403 of the Communications Act, 47 USC §§ 215, 218, 220 and 403, grant broad authority to the Commission to require the production of any and all relevant information. We have previously used this authority to require the detailed reporting of a significant atypical lobbying campaign such as that employed with respect to the Consumer Communications Reform Act of 1976. Recently, we used informal procedures to obtain information about AT&T's lobbying efforts in connection with H.R.5158. *See* letters between the Commission and AT&T dated May 25, 1982 and June 3, ;1982, respectively.

Reporting of Lobbying At the State or Local Level

12. There is some question as to whether we have the authority requested by Common Cause to require the reporting of these expenditures at the state and local level. Although under Section 218 of the Act we may well be able to require fully subject and connecting carriers to report on these lobbying expenses at the state and local level, there is no need to make this determination here. Since at least 39 states have some form of reporting requirement for lobbying expenses, the routine reporting of these expenses to the Commission would only result in increased costs for this duplicative reporting. Individual jurisdictions may perceive special needs for such local reports based on local statutes. An effort to force this diversity into a single mold is not needed.

Conclusion

13. Common Cause has presented no evidence to show that the present method of reporting and accounting for lobbying expenses has adversely affected interstate rates. Therefore, we do not believe it to be in the public interest at this time to undertake the commitment of a rulemaking proceeding based on the Common Cause petition. *See, e.g.*, Regulatory Flexibility Act, 5 USC §§ 601–610; Paperwork Reduction Act of 1980, P. L. 96–511. Moreover, we already are currently undergoing a comprehensive review of our accounting rules in CC Docket 78–196. Instead of reviewing this one particular expense item separately, we believe the better course of action is to assign to the Telecommunications Industry Advisory Group (TIAG) established in CC Docket No. 78–196 the responsibility of developing the necessary accounts, definitions, and accounting rules for lobbying expenditures. We established this advisory group to develop, prepare, and submit a proposal for a basic framwork and content of a revised USOA. The membership of the group represents a balanced cross-section of points of view. It currently has over 40 members representing all segments of the telephone industry, including regulators, independent carriers, equipment manufacturers, other common carriers, AT&T, the American Institute of Certified Public Accountants, consumers and large users. We believe that the recommendation developed by the TIAG will adequately reflect the consumer interests now urged upon us by Common Cause.

14. Accordingly IT IS ORDERED, pursuant to Section 1.407 of the Commission's Rules, that the petition for rulemaking (RM 2875) filed by Common Casue IS DENIED and CC Docket 78–373 IS TERMINATED.

15. IT IS FURTHER ORDERED, That the Telecommunications Industry Advisory Group established by the *Second Supplemental Notice of Proposed Rulemaking and Order* in CC Docket 78–196, 88 FCC 2d 83 (1981), IS ASSIGNED the task of determining the need for separate accounts, definitions, and rules pertaining to accounting for the reporting of expenditures made for lobbying purposes.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarido *Secretary*

SEPARATE STATEMENT
OF
COMMISSIONER JOSEPH R. FOGARTY

IN RE: REPORTING LOBBYING EXPENSES BY REGULATED CARRIERS (CC DOCKET NO. 78–373); REVISIONS TO THE UNIFORM SYSTEM OF ACCOUNTS (CC DOCKET NO. 78–196)

AND

POLICY TO BE FOLLOWED IN THE ALLOWANCE OF LITIGATION EXPENSES OF COMMON CARRIERS IN RATEMAKING PROCEEDINGS (CC DOCKET NO. 79–19); REVISIONS TO THE UNIFORM SYSTEM OF ACCOUNTS (CC DOCKET 78–196).

While I recognize that both carrier lobbying and litigation expenses are potentially significant rate base items warranting Commission scrutiny, I strongly agree with these decisions that the appropriate vehicle for reexamining and recommending possible changes or refinements in the reporting and accounting rules applicable to these expenses is the Telecommunications Industry Advisory Group (TIAG) which the Commission established upon my recommendation in CC Docket No. 78–196, 88 FCC 2d 83 (1981). TIAG's analysis and recommendations with regard to revising the Uniform System of Accounts will have the great value of representing the views of all affected interests—regulators, carriers, and the user public—on these critical and difficult issues. TIAG's recommendations will, of course, be subject to full Commission review and approval. In the interim, the Commission retains its full authority to review and pass upon lobbying and litigation expenses in particular carrier ratemaking or tariff proceedings.

Declaratory Ruling
Maritime Service, Coast Station

Request that state regulation of Class III-B coast stations be federally preempted denied. No adequate showing of irreconciliable federal/state conflict.
—*Radiocall Corporation*

FCC 82-487

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
Petition for Declaratory Ruling by RadioCall Corporation and R.L. Mohr doing business as RadioCall Corporation

MEMORANDUM OPINION AND ORDER

Adopted: November 4, 1982; Released: November 15, 1982

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

1. The Commission has before it a petition for a declaratory ruling filed by RadioCall Corporation (Petitioner). The petition asks the Commission to decide whether state public utility commissions may assert jurisdiction, that is, entry and tariff regulation, over maritime public coast stations. Petitioner urges that such jurisdiction or regulation is, or should be, federally preempted.[1] The petition was opposed by the California Public Utilities Commission (CPUC). The petitioner replied to the opposition of the CPUC.

Background

2. Public coast stations are land stations in the maritime mobile service which are open to public correspondence. See Sections 81.3(e) and (f) of

[1] While the petitioner does not invoke it, Section 1.2 of the Commission's rules authorizes the issuance of declaratory rulings to terminate a controversy or to resolve uncertainty, 47 CFR 1.2.

the Commission's rules, 47 CFR 81.3(e) and (f). Public coast stations provide the public with communications services of various kinds (telegraphy, telephony, narrow-band direct-printing) to and from ships at sea. Public coast stations are common carriers. They are open to the general public and they charge for their services on tariffed terms. These tariffs are filed with the FCC and with state regulatory commissions where required.[2] There are three classes of public coast stations. Section 81.3(h) of the rules, 47 CFR 81.3(h), defines a Class I coast station as a coast station licensed to provide service to ships at sea "over distances up to several thousand miles". Section 81.3(i) of the rules, 47 CFR 81.3(i), defines a Class II coast station as a coast station licensed to provide service "primarily of a regional character". Section 81.3(j), 47 CFR 83.3(j), defines a Class III coast station as a coast station licensed to provide service "primarily of a local character." The matter at hand is limited to the jurisdictional status of Class III-B public coast stations. (The "B" designator indicates the station offers telephone service.)"

Facts

3. The petitioner is the licensee of Public Coast Class III-B station KUF847, located at San Pedro Hill, in California. The State of California, through its Public Utilities Commission (the "CPUC") requires Public Coast III-B stations to obtain a certificate of public convenience prior to their commencement of operation. In addition, the CPUC requires the service involving communications with vessels within three miles of its coast and with vessels on its "inland" lakes. The petitioner asks the Commission to determine that California (and Hawaii[3]) either lacks jurisdiction, or that, even if it does not, its regulation of these coast stations has been federally preempted.

Position of the Parties

4. The Petitioner contends that it should not be subject to the jurisdiction of or regulation by the CPUC. In support of its contention, the petitioner argues that public coast stations do not provide local telephone exchange service and, thus, are not subject to the concurrent jurisdiction of the states. On the contrary, the petitioner argues that public coast stations are "part of a comprehensive scheme of interstate and foreign

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[2] There is a second category of coast stations, called limited coast stations, which are not open to public correspondence and which serve the operational and business needs of ships. See Section 81.3(g) of our rules, 47 CFR 81.3(g). Because state public utility commissions typically regulate only common carrier services, the status of limited coast stations is not germane to this discussion.

[3] RadioCall is also the licensee of public coast III-B stations KGW423, Honolulu and KLU758, Wailuku, Hawaii. According to petitioner, Hawaii also regulates rates for calls made by vessels within 3 miles of its coast. There is no evidence that petitioner served the State of Hawaii with a copy of its petition. We have no response thereto from the state of Hawaii. However, in view of our action herein, the State of Hawaii's interests have not been negatively affected by this non-participation.

communications" and are subject only to regulation by the FCC, which has been established by Congress to fully occupy the field of public coast station regulation, and, as such, "there is nothing remaining for the states to regulate".[4]

5. Further, the Petitioner argues that it is difficult and, at times, impossible for a coast station operator to determine the location of a ship which is using its services. Thus it cannot determine whether the vessel is within the State's territorial waters and whether its state tariff applies. In any event, the requirement to determine the vessel's location places an intolerable burden on the service, according to Petitioner, which would warrant federal preemption even if concurrent jurisdiction were assumed. The petitioner further argues that it "cannot" reserve one channel for intrastate calls and another for interstate calls.[5] The petitioner argues that state regulation may result in federal state conflicts over such questions as entry into or exit from the market and competition within the service.

6. The CPUC argues, on the other hand, that it has properly asserted jurisdiction under Sections 2(b) and 221(b) of the Communications Act of 1934, as amended, 47 U.S.C. 151, et seq.[6] The CPUC argues that Section 3(e) of the Act contains an explicit reservation of state jurisdiction in cases such as this.[7]

7. The CPUC also argues that this Commission and the petitioner have acknowledged its authority in *Advanced Electronics, et al.*, 19 FCC 2d 601 (1969). In that case, the present petitioner, then known as Advanced Electronics, was one of several applicants for Class III-B public coast stations. The applications were objected to on the ground that the applicants had not, at the time the applications were designated for hearing, obtained a certificate of public convenience and necessity from the CPUC. In disposing of that objection the Commission stated:

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[4] See *Petition for a Declaratory Ruling* at page 2.

[5] Regardless of the merits of this contention, such a division of channels would be unwarranted for reasons of spectrum efficiency and would, in all likelihood, be confusing to the user public.

[6] Section 2(b) provides, in relevant part, that: ". . . subject to the provisions of Section 301, nothing in this Act shall be construed . . . to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service . . . by radio of . . . any carrier . . . Section 221(b) provides, in relevant part, that: "Subject to the provisions of Section 301, nothing in this Act shall be construed . . . to give the Commission jurisdiction with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with . . . mobile . . . radiotelephone exchange service . . . even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by a local governmental authority."

[7] Section 3(e) defines the term "interstate communication" for purposes of the Act and provides, in relevant part, as follows: "Interstate communication . . . shall not, with respect to the provisions of Title II of this Act . . . include . . . radio communication between points in the same state . . . through any place outside thereof, if such communications is regulated by a State commission."

> The question of the requirement for a certificate of public convenience and necessity from the California Public Utilities Commission has been raised in pleadings and correspondence related to some of the applications hereunder consideration. It should be noted that part 81 of the Commission's Maritime Service Rules and Regulations does not contain a provision similar to section 21.15 (c)(4) of Commission's Domestic Public Radio Services and Regulations where the possession of the State certificate of public convenience and necessity, if required, must be demonstrated by an applicant. This is not to say that the State of California lacks jurisdiction over such portions of the maritime communication services proposed as are proved to be intrastate in character. The Commission, however, does not require such a certificate as a condition precedent to a grant of an authorization for a public coast station. However, any grants made will be conditioned on the applicant securing any appropriate or required authorization from the State regulatory commission. 19 FCC 2d 601, 604.

The CPUC asserts that California has taken no action to frustrate competition and the contention that it might is no basis for federal preemption.

8. The CPUC recognizes the problem certain coast station operators encounter distinguishing between interstate and intrastate calls. The CPUC attempted to minimize this problem for the Pacific Telephone and Telegraph Company by conforming its tariff to federal (FCC) rates. California offered the following explanation to justify its action.

> "The proposed revisions will eliminate repeated adjusting of intrastate VHF Maritime and Coastal Harbor rates to conform to interstate rates when the interstate rates are revised. It is necessary to depart from a graduated rate structure as contemplated in Section 461 of the Public Utilities Code because of the difficulty in accurately locating the calling vessel in relation to interstate/intrastate jurisdiction. The utility indicates the present VHF tariff is difficult to administer and is confusing to the customer. The revisions authorized therein will eliminate the administrative problems and will be more understandable to both the utility and the customer." *California Public Utilities Commission, Resolution T-10355.*

California points out that the Petitioner is free to request a conforming tariff but has not done so.

9. Finally, California points out that not all public coast stations experience difficulty in locating vessels because they serve inland lakes or waters where vessels do not go beyond state jurisdictional limits.

Discussion

10. In regulating class III-B public coast stations, the Commission has not thwarted the state regulation of common carriers doing business within their borders. Accordingly, the Commission has conditioned grants of its licenses on a licensee's obtaining necessary authority from state regulatory commissions. The petitioner states that such action by the Commission does not constitute an express recognition by the Commission of state jurisdiction. While that may be true, the issuance of conditional grants reflects our reluctance to oust states from their regula-

tory roles, except where a strong showing has been made. See *People of California v. FCC*, 567 Fed. 2d 84 (D.C. Cir. 1977), Cert. Denied, 434 U.S. 1016 (1978). Petitioner's arguments as to entry regulation are speculative and are not a compelling basis for the assertion of preemptive federal jurisdiction in this case. We know of no case in the history of the Maritime Mobile Service in which an applicant, having obtained a license from the FCC, has been denied a franchise or other operating authorization by a state regulatory commission. The fact that such a situation might arise is certainly no basis for preempting entry regulation by the states.

11. The petitioner argues at length that, even if concurrent jurisdiction is legally permissible, the Commission should preempt tariff regulation by the states. We are not persuaded that we should do so. California's invitation to request a conforming tariff is sufficiently responsive to the Petitioner's complaint to provide complete relief to the Petitioner, without the need for federal preemption.

12. Lastly, the Petitioner asserts that the administrative burden of complying with state, as well as federal, regulatory requirements might hinder the rapid and efficient provision of the Maritime Mobile Service in the interest of safety. Thus far, however, concurrent assertions of jurisdiction by state regulatory commissions have had no such effect. If future experience evidences otherwise, we will revisit this matter. Having reached this result, it is not necessary to rule on whether the Communications Act reserves jursidiction to the states in cases such as this.

Order

13. For the reasons set above, IT IS ORDERED, That the petition for a declaratory ruling filed by RadioCall Corporation IS GRANTED to the extent of answering the questions raised therein but IS DENIED to the extent that it asks the Commission to preempt state regulation of the intrastate aspects of public coast Class III-B station operations.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

92 F.C.C. 2dCommon Carrier, Accounting Order,
Comsat
Expenses, Apportionment of
Refund

Commission clarified refund procedures in Comsat flow-through proceeding, 56 FCC 2d 1187, to state that administrative expenses incurred by international record carriers in making refunds were to be borne by Comsat.
—*RCA Global Communications, Inc.*

FCC 82–490

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

RCA GLOBAL COMMUNICATIONS, INC.

Proposed Methods of Refunding Certain Monies Held in Escrow by the Communications Satellite Corporation

ORDER ON CLARIFICATION

Adopted November 4, 1982; Released November 10, 1982

BY THE COMMISSION: COMMISSIONER DAWSON CONCURRING; COMMISSIONER RIVERA ABSENT.

1. Before the Commission are requests by RCA Global Communications, Inc. (RCA), TRT Telecommunications Corp. (TRT), and the Department of Defense (DOD) seeking clarification of recent actions by the Commission accepting proposals made by several international record carriers (IRCs) to refund certain monies held in escrow by the Communications Satellite Corp. (Comsat). *RCA Global Communications, Inc.*, FCC 82-361, released August 9, 1982; *ITT World Communications, Inc., (Refund Approval)*, 89 FCC 2d 973 (1982). RCA, TRT and DOD request that we clarify whether the escrow, accounting and administrative costs

associated with making the refunds are to be deducted by the IRCs from amounts refunded, or are to be paid by Comsat. For the reasons indicated below, we find that these costs are to be borne by Comsat in their entirety.

Background

2. The background to the Comsat flow-through proceeding is fully set forth in *Refund Approval*. However, a brief review of the aspects of this proceeding relevant to administrative costs of refunds by the IRCs will be helpful here. In *Communications Satellite Corp.*, Docket No. 16070, 56 FCC 2d 1101 (1975), the Commission concluded that Comsat's rates were too high and directed it to file substantially reduced rates. At the same time, Comsat's carrier-customers were placed on notice that they would be expected to file reduced rates reflecting the lower costs of Comsat service so that the public could eventually benefit from Comsat's rate reductions. We concluded that this flow-through of rate reductions by the carrier-customers should be "net of direct and administrative costs" related to the flow-through. 56 FCC 2d 1187. *See also American Telephone and Telegraph Co.*, Docket 20639, 56 FCC 2d 821 (1975), *pleading schedule and issues modified*, 67 FCC 2d 966 (1978).

3. Comsat sought judicial review of the Commission's decision in the U.S. Court of Appeals for the District of Columbia Circuit, as well as a stay of the decision pending resolution. In its stay request, Comsat specifically volunteered to pay administrative costs of any accounting procedure deemed just and reasonable by the Court. Motion for Stay, filed February 6, 1976, p. 62, Civil Action No. 75–2193. Thereafter, the stay was granted by the court conditioned upon the entry by this Commission of an accounting and refund order deemed appropriate by it to protect the interests of all parties "[with] Communications Satellite Corporation to assume all administrative costs thereof." *Communications Satellite Corp. v. F.C.C.*, Case No. 75-2193 (Order filed June 16, 1976).

4. Thirty days later, the Commission entered an accounting and refund order which provided that Comsat could continue to bill its carrier-customers at its existing rates pending appeal but that the difference between these rates and the reduced rates ordered by the Commission was to be placed in escrow for eventual refund to Comsat's carrier-customers and ultimately to the public. *Communications Satellite Corp.*, FCC 76–688, released July 15, 1976. *Communications Satellite Corp.*, FCC 76–688, released July 15, 1976. Accounting requirements were imposed both on Comsat and its carrier-customers. Concerning the costs of these accounting procedures and refunds we stated as follows:

> Such carriers [*i.e.* Comsat's carrier-customers] should also establish and maintain fair and accurate accounting records of all administrative costs associated with the instant accounting and refund procedures, including those associated with the preparation and filing of informational tariffs. Likewise, Comsat shall establish and maintain account-

> ing records of its costs associated with the instant accounting and refund procedures and the filing of informational tariffs. These costs *together with* the administrative costs of its carrier-customers are to be accounted for as below the line expenses, upon disposition of appellate procedures.

FCC 76–688, para. 5. (emphasis added).

5. Following the conclusion of the appellate process[1] the Commission entered several orders which dealt generally with Comsat's final reduced rates and the flow-through rate reductions and refunds by its carrier-customers.[2] Those orders did not specifically readdress the issue of the treatment of escrow and accounting costs associated with the refunds. However, in a letter dated June 23, 1978 from the Chief, Common Carrier Bureau to the IRCs, the Bureau advised that any administrative costs offset to the general goal of full flow-through were to be fully documented. And, in a recent pronouncement involving RCA's refund proposal, the Commission not only stated that RCA would be required to fully justify any funds retained to cover administrative expenses, but emphasized once more that flow-through should be net of direct and administrative costs. FCC 82–361, para. 7 and fn. 6.

Discussion

6. Against this background, DOD and TRT argue essentially that the Commission's 1976 accounting and refund order clearly required that the costs of making refunds are to be borne by Comsat. In other words, under this reading, customers of the IRCs would receive a refund of overcharges without any reduction reflecting the administrative costs of such a refund. RCA, on the other hand, argues that FCC 82–361, as the Commission's most recent statement, supersedes prior pronouncements and permits RCA to withhold suitable amounts for its administrative costs of providing refunds. It favors this interpretation as a means to reduce incentives for Comsat to dispute RCA's costs of making refunds, thereby making certain a full reimbursement to RCA. In short, the issue presented is whether the Commission's implementation process fashioned for flow-

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[1] The Commission's decision in Docket 16070 was affirmed in all major respects but remanded for further consideration of some limited technical issues. *Communications Satellite Corp. v. Federal Communications Commission*, 661 F.2d 883 (D.C. Cir. 1977).

[2] *See, e.g. Communications Satellite Corp.*, Docket 16070, 68 FCC 2d 941 (1978), *recon. denied*, 70 FCC 2d 1449 (1979) (settlement agreement on Comsat's final reduced rates); *American Telephone and Telegraph Co.*, 69 FCC 2d 1659 (1978) (flow-through tariffs and refund proposals of AT&T, Hawaiian Telephone Co., and All Americas Cable & Radio for message telecommunications service); *American Telephone and Telegraph Co.*, FCC 79–375, released June 28, 1979 (flow-through tariff and refund proposal for AT&T's private line service). *TRT Telecommunications Corp.*, 70 FCC 2d 2149 (flow-through tariffs of the international record carriers); *ITT World Communications, Inc.*, 89 FCC 2d 973 (1982) (refund proposals of ITT World Communications, Inc., TRT Telecommunications Corp., and Western Union International, Inc.); and *RCA Global Communications, Inc.*, FCC 82–361, released August 9, 1982 (refund proposal of RCA).

through would permit a carrier-customer such as RCA to withhold the administrative costs of providing refunds, thereby reducing the ultimate refund to be received by IRC customers.

7. As indicated, the monies which RCA and the other IRCs have proposed to refund to their customers are essentially overcharges by Comsat which were placed in escrow by the carrier pursuant to the Commission's accounting and refund order, FCC 76–688, *supra*, pending appeal of the Commission's decision in Docket No. 16070. In that order, which was intended to govern the treatment of these expenses, we stated without qualification that the accounting and administrative costs associated with the refunds were to be borne by Comsat as below the line expenses. Our purpose was to ensure that the refunds to ultimate customers not be diluted by the costs of such refunds, particularly since these customers had in no way been responsible for these overcharges. We have not been made aware of any other consideration that outweighs this goal. Indeed, this result dovetails with the Court's order, which conditioned a stay on Comsat's assumption of accounting and refund costs and, indeed, on Comsat's own representations that it would bear any administrative costs deemed appropriate by the Court.[3]

8. We recognize now that our subsequent statements were contradictory and may have led parties such as RCA to infer that we would now permit refunds to be net of direct and administrative costs. *Communications Satellite Corp.*, Docket No. 16070, 68 FCC 2d 941 (1978), *recon. denied*, 70 FCC 2d 1449 (1979); letter from Chief, Common Carrier Bureau, dated June 23, 1978; *RCA Global Communications, Inc.*, FCC 82–361, released August 9, 1982. However, it is important to recognize that these subsequent statements have their genesis in our initial determination in Docket 16070 that flow-through of *rate reductions* should be accomplished net of direct and administrative costs. At the time this statement was made, we had not yet directed the establishment of the Comsat escrow account or required that the associated accounting and *refund costs* be borne by Comsat. Thus, our language referring to flow-through net of direct and administrative costs should be interpreted as referring to rate reductions only, and to the extent any subsequent statements have been perceived as governing the treatment of refund expenses, we find they were in error, and therefore overrule them.

9. This leaves one other related clarification matter, namely, whether the IRC carrier-customers themselves are liable for any escrow costs

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[3] The Commission has not set forth specific billing procedures for the IRCs to recover expenses from COMSAT. We anticipate that this process can be achieved informally between the carriers. However, we emphasize that we have imposed reporting requirements on the IRCs with respect to their handling of refunds, *Refunds Approval*, fn. 13; *RCA Global Communications, Inc.*, *supra*, para 7, and if necessary we will further require the IRCs to fully justify administrative expenses billed to COMSAT.

under the settlement agreement in Docket No. 16070, accepted by the Commission in *Communication Satellite Corp.*, 68 FCC 2d 941, (1978). As indicated by DOD, Paragraph 3 of the settlement agreement provided that certain escrow costs were to be borne by Comsat's carrier-customers if, at the time Comsat filed its final reduced rates, the carrier-customers had not agreed to file reduced rates flowing through Comsat's rate reduction to the ultimate consumer.[4] Comsat's rate reductions became effective August 15, 1978, and shortly thereafter RCA and the other IRCs filed flow-through tariffs which became effective in January, 1979. In our view, these filings by the IRCs of flow-through rate reductions constituted substantial compliance with the letter and intent of Paragraph 3. We find, therefore, that the IRCs should not be liable for any of the limited escrow costs that they otherwise would have been obligated to assume.

10. Accordingly, IT IS ORDERED, that *RCA Global Communications, Inc.*, FCC 82–361 released August 9, 1982, and ITT World Communications, Inc., 89 FCC 2d 973 (1982) ARE CLARIFIED to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico, *Secretary*

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[4] Paragraph 3 provides as follows:

> The Commission will confirm its intention to require flow-through to the ultimate users both of the funds in escrow and of the cost savings to Comsat's carrier-customers of reductions in Comsat's tariffs. With respect to funds in escrow subject to refund (with accrued interest) through the effective date of Comsat's revised tariffs, Comsat will not distribute such funds to any international communications common carrier until the flow-through issue has been resolved or until such earlier time as any carrier agrees to flow through any portion thereof, in which case such portion of the escrow shall be released for flow-through as appoved by the Commission. Comsat will file its revised tariffs within seven business days after entry of a final order approving this Settlement Agreement. After such notice to the public as the Commission deems appropriate, the revised tariffs shall be the lawful governing tariffs for the provision by Comsat of international communications satellite services. If, at that time, the flow-through issue has not been finally resolved, Comsat will, upon request of the Commission, continue to bill at the rates in effect before the date of the Settlement Agreement those common carrier customers that do not agree to flow through the cost savings resulting from the reductions in Comsat's revised tariffs or agree to place in escrow amounts equal to the difference between Comsat's revised tariffs and the tariffs in effect before the date of final settlement (the administrative cost of such escrow account to be borne by the carrier customer). In the event Comsat continues to bill any carrier customer at the rates in effect before the date of final settlement, Comsat will establish a separate escrow account into which it will place the difference between the amount billed the carrier-customer and Comsat's revised tariffs (the administrative costs of such escrow account to be borne by the carrier-customer).

Policy Statement
Tax Certificate

Commission issued policy statement barring tax certificates for sales which do not effectuate any new or changed Commission policy. This approach will better accomplish the purpose of Section 1071 of 1954 Internal Revenue Code and eliminate both the need for detailed factual showings and for subsequent analysis of that data by Commission staff.
—*Tax Certificates*

FCC 82-497

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Policy Statement on Issuance of Tax Certificates

Commission issued policy statement barring tax certificates for sales which do not effectuate any new or changed Commission policy.

November 10, 1982

The Commission issued the following PUBLIC NOTICE:

Policy Statement On Issuance of Tax Certificates

In recent years, the Commission has been asked to issue tax certificates, pursuant to Section 1071 of the Internal Revenue Code, for sales of radio broadcast properties in instances where those sales, in whole or in part, did not directly effectuate Commission policies.[1] Typically, sellers

[1] Section 1071 of the 1954 Internal Revenue Code provides:

> If the sale or exchange of property (including stock in a corporation) is certified by the Federal Communications Commission to be *necessary or appropriate* to effectuate a change in a policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations, such sale or exchange shall, if the taxpayer so elects, be treated as an involuntary conversion of such property within the meaning of Section 1033 . . . 26 U.S.C. § 1071 (Emphasis added.)

Although written in terms of "radio broadcasting stations", Section 1071 encompasses not only to AM, FM, and television broadcast stations, but also cable television systems and television broadcast networks, all of which provide a mass communication service ancillary to broadcasting and hence are subject to Commission regulation. *J.A.W. Iglehart*, 38 FCC 2d 541 (1972); *Cosmos Cablevision Corp.*, 33 FCC 2d 292 (1972).

have argued that a group of properties constituted a "single operational entity" and, on that basis, sought tax certificates for both those properties whose sales did effectuate a new or revised Commission policy, and for the other associated properties in the group. *Georgia Cablevision Corp.*, 83 FCC 2d 326 (1980); *Cosmos Cablevision Corp.*, 33 FCC 2d 293 (1972).

In the past, we issued tax certificates in those instances where we agreed that the group of properties comprised a single operational entity, *Cosmos Cablevision, supra*, or where we were persuaded that the associated properties were "unsaleable separately", *General Telephone and Electronics Co.*, 51 FCC 2d 502 (1975), or that their sale was a "practical economic necessity", *Continental Telephone Corp.*, 51 FCC 2d 284 (1975). *See also Kansas State Network, Inc.*, 89 FCC 2d 392 (1982) (concurring opinion of Commissioner James Quello), Petition for Review pending *sub. nom. Kansas State Network, Inc. v. Federal Communications Commission*, D.C. Cir. Case No. 82-1319; *King Videocable Co.*, 49 FCC 2d 1297 (1974). These factual determinations required detailed scrutiny of the nature and viability of the associated properties and of market conditions existing at the time of sale. *Id.* Recently, we have questioned whether we should continue these detailed inquiries or, instead adopt a more limited tax certificate policy which would eliminate the need for determinations of this type. *Kansas State Network Inc., supra.*

We have re-evaluated our present practice in applying Section 1071 to these situations and now believe that, in future transactions, we should issue tax certificates only where the sale of property *directly* effectuates Commission policy. In cases where only part of a sale effectuates one of our policies a certificate would be granted for only the "effectuating" portion of the sale. In all other respects, our present tax certificate policies will remain intact. *Issuance of Tax Certificates*, 59 FCC 2d 91 (1976); *Issuance of Tax Certificates*, 19 RR 2d 1831 (1970); *Issuance of Tax Certificates*, 14 FCC 2d 827 (1956). *See also Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978).

We believe this refinement of our policy would be appropriate for several reasons. First, and most importantly this approach would better accomplish the purposes of Section 1071 by ensuring the issuance of tax certificates only for sales which actually bring the seller's retained telecommunications interests in closer alignment with prevailing Commission policies. Secondly, this narrowed policy would eliminate both the need for detailed factual showings concerning the involved properties, and for subsequent analysis of that data by Commission staff. This, in turn, would conserve limited Commission resources and, at the same time, would permit parties to assess accurately the tax consequences of contemplated sales prior to their occurrence.[2]

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[2] This would be especially useful in connection with sales of cable television properties. Generally, such sales do not require prior Commission approval. Consequently, applications for tax certificates for these sales are not usually received, or processed, until after the sales are completed.

Henceforth, our consideration of requests for tax certificates could be greatly simplified—to the extent that any sale of a "radio broadcasting station" *directly* effectuated Commission policy, a tax certificate would be issued. With respect to all other such sales, requests for tax certificates would be denied.

We recognize the hardship which might ensue if this more limited certification policy were to be applied immediately. For this reason, we envision applying this modified policy only to sales resulting from contracts entered into after November 15, 1982.

Action by the Commission November 4, 1982. Commissioners Fowler (Chairman), Quello, Fogarty, Dawson and Sharp, with Commissioner Jones dissenting and issuing a statement.

—FCC—

DISSENTING STATEMENT
OF
COMMISSIONER ANNE P. JONES

IN RE: POLICY STATEMENT CONCERNING ISSUANCE OF TAX CERTIFICATES

In my view the tax certificate procedure has been a very useful and efficient device for effectuating Commission policies. It there seems to me that the majority's decision today to limit issuance of tax certificates only to sales of property which directly effectuate Commission policy may be one we will live to regret. For example, tax certificates have, in my judgment, been the best device available to the Commission for furthering its policy of fostering increased minority ownership of broadcasting facilities, and I am very concerned that today's decision could in some circumstances reduce the usefulness of certificates for that purpose in the future.

With these concerns in mind, I would have preferred that instead of simply announcing this decision we propose it as a change of tax certificate policy and invite public comment on it. On the basis only of the information and arguments now before us, I simply am not convinced that today's decision by the majority is correct.

I therefore respectfully dissent.

Citizens Radio Service, Operating Rule
License, Revocation Grounds for

Review Board Decision, 71 FCC 2d 1330, reversing an Initial Decision, set aside. Section 312 of the Act authorizes revocation of license based on matters existing prior to grant of renewal which were unknown to Commission.
—*Theodore E. Sousa*
SS Docket No. 78–89

FCC 82–480

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Revocation of License of THEODORE E. SOUSA 14909 Cottage Grove Dolton, Illinois 60419 Licensee of Station KEV–6939 in the Citizens Band Radio Service	SS Docket No. 78–79

MEMORANDUM OPINION AND ORDER

Adopted: October 28, 1982; Released: November 4, 1982

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

1. The Private Radio Bureau (PRB) has filed an Application for Review of the Review Board's Decision in this revocation proceeding.[1] That Decision[2] reversed an Initial Decision,[3] which recommended the revocation of Theodore E. Sousa's Citizens Band (CB) radio license. In essence, the

[1] The PRB has also filed a Motion for Expedited Relief, a Motion for Leave to File Supplement to Application for Review, and a Supplement to the Application for Review. For good cause shown, we have accepted the Supplement to the Application for Review. Finally, we have acted on this case in a manner consistent with the priorities for other matters and our overall administrative responsibilities.

[2] 71 FCC 2d 1330 (1979).

[3] 79 FCC 2d 545 (1979).

Review Board (Board) held that a radio station license cannot be revoked solely upon the basis of licensee misconduct that occurred during a previous license term and was known by Commission investigators prior to a grant of a license renewal. For the reasons discussed below, we believe that review is warranted and that the case should be remanded to the Board for consideration of the merits of Mr. Sousa's exceptions to the Initial Decision.

Background

2. Theodore E. Sousa is a self-employed television and electronics repairman in Chicago, Illinois.[4] In 1973, Mr. Sousa received a license for CB Station KEV–6939 that was due to expire June 23, 1977.[5] Prior to the expiration of his license, Commission personnel in the Field Operations Bureau's (FOB) Chicago office monitored Mr. Sousa's station on June 15, 1977. They concluded that his station was operating in violation of numerous Commission Rules. Thus, on June 27, 1977 they mailed Mr. Sousa an Official Notice of Violation (FCC Form 793) regarding the June 15 violations. The violation form instructs licensees to respond within ten days. Mr. Sousa's response was received on July 15, 1977 in Chicago. On July 19, 1977 the Chicago FOB office sent a case report (including the Form 793 and Mr. Sousa's response) to FOB's Washington, D.C. headquarters office to be evaluated.

3. In the meantime, Mr. Sousa submitted an application dated June 16, 1977 to renew the license which was due to expire on June 23, 1977. That application was mailed to Gettysburg, Pennsylvania, where CB radio applications are processed by computer. On July 31, 1977, the Gettysburg office issued a routine computer renewal of Mr. Sousa's license.

4. On August 30, 1977 FOB headquarters office forwarded the case file to the PRB where it was received on September 2, 1977.[6] The case was then assigned to an attorney who made a preliminary determination that Mr. Sousa's alleged misconduct was serious enough to warrant possible revocation. Accordingly, on September 27, 1977 Mr. Sousa's name was added to a "withhold list," a list of persons who should not receive routine license grants. However, as noted above, the Gettysburg office had already issued a routine renewal of Mr. Sousa's CB license on July 31.

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[4] The background is set forth in more detail in the Initial Decision, 79 FCC 2d at 546-550. Because we are remanding this case for consideration of Mr. Sousa's exceptions to the Initial Decision, the facts are being discussed only as background to the handling of the matters now before us.

[5] This license was renewed on July 31, 1977. As discussed hereafter, the subject of this proceeding is Mr. Sousa's renewed license.

[6] Under Sections 0.131 and 0.331 of the Commission's Rules (47 C.F.R. §§ 0.131, 0.331), the PRB is delegated the authority to license and regulate CB radio stations. Investigation of CB radio rule violations, however, is the duty of the FOB under Sections 0.111 and 0.311 of the Commission's Rules (47 C.F.R. §§ 0.111, 0.311).

Consequently, by the time the PRB became aware of Mr. Sousa's alleged violations, the thirty day time period within which to set aside the renewed license had expired.[7] Accordingly, the PRB decided to institute this proceeding to revoke Mr. Sousa's renewed license.

5. The PRB initiated this proceeding on January 24, 1978 by issuing an Order (SS–198–78) directing Mr. Sousa to show cause why his license should not be revoked. The Order alleged that Mr. Sousa operated his station on June 15, 1977 in willful and repeated violation of the following Commission Rules: Sections 95.471(c) (failure to identify the station by its assigned call sign); 95.501(b) (communicating with another station at a distance of more than 150 miles); and 95.469(b) (communications in excess of five consecutive minutes).[8] The violations were deemed to be repeated because Mr. Sousa had paid without protest forfeiture liabilities for similar violations of these Rules in 1973 and 1976. The Order further alleged that Mr. Sousa had failed to make his station available for inspection when requested to do so by authorized Commission representatives, in willful violation of Section 95.521 of the Commission's rules.[9] The Order concluded that it appeared that "the Commission would be warranted in refusing to grant an application filed by Sousa for a Citizens Band radio station license if the original application were now before it."[10]

6. An evidentiary hearing was held on September 14, 1978. On January 26, 1979, the Administrative Law Judge (ALJ) released an Initial Decision which recommended revoking Mr. Sousa's license. The ALJ found repeated and willful violations of the Rules as charged, over the claims of Mr. Sousa that he had not admitted or been adjudged guilty of the 1973 and 1976 infractions, and that he had been advised by his local attorney not to permit the inspection of his facilities unless the Commission employees had a search warrant. Mr. Sousa also pleaded, as a mitigating consideration, the fact that he founded a CB radio club to assist in securing general obedience to the Commission's Rules.[11]

7. On March 19, 1979 the proceeding went before the board on exceptions filed by Mr. Sousa.[12] In general, Mr. Sousa contended that he did not

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[7] 47 C.F.R. § 1.108.

[8] Those Rule Sections were subsequently simplified in ways not relevant here, and renumbered. For their text in June 1977, *see* 42 Fed. Reg. 8326.

[9] *Id.*

[10] Section 312(a)(2) of the Communications Act of 1934 (hereinafter referred to as the Act) provides that the Commission may revoke any station license "because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application. . ." 47 U.S.C. § 312(a)(2). Under Section 312(d) of the Act, both the burden of proceeding with the introduction of evidence and the burden of proof rest with the Commission. 47 U.S.C. § 312(d).

[11] Mr. Sousa claimed to be the founder and head of Little Rascals International, a large single sideband CB club that distributes copies of a code of conduct and the Commission's CB Rules to its members in order to promote self-policing of single side band operation. Tr. 143–145.

[12] By Order (FCC 79R-10, released February 28, 1979), the Board granted an extension of time for the filing of exceptions. The PRB responded to Mr. Sousa's exceptions on April 2, 1979.

willfully refuse to permit the inspection of his station; that his prior forfeiture payments did not constitute an admission of repeated violations; and that the mitigating factors were not considered by the ALJ. Thereafter, the Board requested comments on an issue neither argued by the parties below, nor asserted by Mr. Sousa in his exceptions: the effect of a grant of a renewal of license upon the Commission's authority to revoke a license for conduct occurring and known to the Commission during the previous license term.[13] Upon this issue, the Board reversed the Initial Decision without considering the merits of Mr. Sousa's exceptions.

The Review Board Decision

8. The Board held that it was established law that a renewed license could not be revoked solely because of licensee misconduct occurring in a previous license term and known by the Commission at the time the renewal was granted. The Board stated that, in *Radio Para La Raza*,[14] the Commission considered and rejected a community group's 1972 petition to revoke a broadcast station license for programming deficiencies that occurred during the station's 1968–1971 license term and that were reflected in the renewal application. The station's license had been renewed in 1971 by the Broadcast Bureau under delegated authority. Noting that a grant of a renewal is subject to reconsideration within thirty days, the Commission found that the request for revocation, in effect, sought review of the grant of the 1971 renewal application insofar as the revocation request pertained to the station's performance during its 1968–1971 license term. The Commission stated that such matters were beyond review in light of a strong policy in favor of administrative finality.

9. The Board recognized that Section 312(a)(2) of the Act permitted the revocation of a license because of newly discovered conditions coming to the attention of the Commission which would warrant a denial of an original application.[15] It concluded, however, that this provision could not justify the revocation of Mr. Sousa's license on the grounds that his rule violations, while known to FOB, were not known to PRB at the time his license was renewed. The Board reasoned that the Commission cannot be considered a federation of independent units whose actions have separate legal significance. Instead, the Commission is one agency, and where its Bureaus act within the scope of their authority, their actions are the agency's actions. When the FOB investigates rule violations by CB licensees, it acts on behalf of the Commission under a delegation of authority granted pursuant to Section 5(d) of the Act.[16] That Section states that any

[13] Order, FCC 79R-18 (released April 19, 1979).
[14] 40 FCC 2d 1102 (1973).
[15] 47 U.S.C. § 312(a)(2)
[16] 47 U.S.C. § 5(d).

action taken under delegated authority has the force and effect of an action by the Commission.[17] From this, the Board further reasoned that the PRB could not disclaim knowledge of information known by the FOB. The board also claimed that this was analogous to *Radio Para La Raza* where the Commission did not disclaim knowledge of the information which had been before the Broadcast Bureau when it granted a renewal under delegated authority. The Board further declared that, "The proper standard for determining when this agency has knowledge of license misconduct is to impute such knowledge to the agency and its constituent parts when the employees whose duty it is to acquire that knowledge officially come into possession of it."[18] Since it was the duty of the FOB to investigate rule violations in the CB radio service, and since the Commission's engineers in that Bureau were engaged in that duty on June 15, 1977 when they learned of Mr. Sousa's alleged violations, the Board concluded that when the FOB learned of the violations, the Commission learned of the violations and, perforce, the PRB learned of the violations.

10. Moreover, the Board pointed out that any license renewal requires a statutory determination (under Sections 307(d) and 309(a) of the Act)[19] that a grant thereof will be in the public interest, convenience and necessity. Such a finding, the Board reasoned, is required regardless of whether it is expressed in a public opinion or order, and regardless of whether it is made by the Commission itself or by PRB under a delegation of authority. Thus, the Board concluded that the computer renewal of Mr. Sousa's license implicitly determined the merits of his alleged violations, knowledge of which was imputed to the PRB at the time of renewal.[20]

11. Finally, the Board declared that, in the interest of administrative finality, a license grant must be considered final after a thirty day reconsideration period. Any other result, the Board pointed out, would lead to an intolerable situation in which the finality of a grant would actually depend upon the transmittal of information to the Commission's licensing Bureaus. No plausible argument of administrative necessity could justify such licensee jeopardy, the Board concluded. Moreover, in this case there was a period of two and one half months during which the FOB could have notified the PRB that serious rule violations had been discovered which

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[17] 47 U.S.C. § 5(d)(3).

[18] 71 FCC 2d at 1333. In general support of this proposition, the Board noted that, in *Giglio* v. *United States*, the Supreme Court held that knowledge of an Assistant United States Attorney's promise of leniency to a witness was knowledge attributable to all attorneys in his office. 405 U.S. 150 (1972).

[19] 47 U.S.C. §§ 307(d), 309(a).

[20] The Board also contended that a standard of finality based upon matters considered by the Commission, rather than matters presented to it, would not be workable. The vast majority of opinion so that there is no satisfactory method of determining what particular information was in fact considered (*i.e.*, thought about with care) when a renewal is granted. Such a test, the Board claimed, would effectively destroy the finality of the overwhelming majority of renewal grants.

might bear upon Mr. Sousa's qualifications to remain a licensee. All that was needed, the Board stated, was to "flag" Mr. Sousa's renewal application, even if all of the details were not immediately transmitted.

The Application for Review

12. The PRB contends that the Board misapplied the *Radio Para La Raza* case, erred in questioning the validity of the Order to Show Cause, and underestimated the administrative impact of its Decision. It is the PRB's position that *Radio Para La Raza* is inapposite. There, the Commission merely held that it would not reconsider matters from a previous license term if they were actually considered in a license renewal, not just known in some way to some agency official as was the case here. Relying on *Greater Kampeska Radio Corp.* v. *FCC*,[21] the PRB also contends that the court has rejected the contention that the Commission is barred from considering violations from prior license terms because each renewal grant "wiped the slate clean" as to character and qualification issues. There, the Bureau notes, the court specifically pointed out that the Commission may consider conduct in a prior license term as an additional basis of experience upon which to determine a licensee's character and fitness during license or revocation proceedings.

13. Moreover, the PRB claims that under *Frank H. Yemm*[22] the Board lacked the authority to issue an opinion that really went to the validity of the Order to Show Cause, not the facts established pursuant to it. Noting that the Board's Decision is devoid of any substantive discussion of Mr. Sousa's misconduct, the PRB argues that the Board therefore really held that the PRB did not have the authority to institute this revocation proceeding.

14. Finally, the PRB claims that it is administratively impractical to "flag" problem CB applicants in order to prevent undesired computer license grants. The PRB states that the FOB issues annually approximately 900 official Notices of Violations to CB operators, and only an estimated 25% of those cited are placed on a "withhold list" in order to delay computer grants of their applications. To "flag" all alleged violators would result in several hundred more persons being added to the list each year, and subsequently removed should a later evaluation indicate that they are qualified to remain licensees. Those persons unnecessarily placed on the list would encounter delays in the processing of their applications, and Commission staff time and computer resources would be wasted. The PRB claims that, to avoid such licensee unfairness and Commission waste, it is better to continue the current practice of instituting revocation proceedings based upon a confirmation of serious miscon-

[21] 108 F.2d 5 (D.C. Cir. 1939).

[22] 33 RR 2d 1657 (1977).

duct after license grants. The current procedure, the PRB adds, also results in a minor benefit to an alleged violator, since in a revocation proceeding the Commission has the burden of proving a licensee's lack of qualifications.

Discussion

15. At the outset we note the PRB's argument that the Board lacked the authority to challenge the validity of the Order to Show Cause. In *Frank H. Yemm, supra,* we held that neither an ALJ nor the Review Board may dismiss a proceeding initiated by a bureau on the basis that the bureau improperly exercised its delegated authority: "[s]uch action by the Judge or the Review Board would defy the statutory structure for review of delegated authority." 39 RR 2d at 1659. Accordingly, insofar as the Board challenged the validity of the Order to Show Cause issued by the PRB under delegated authority, its action was improper. However, because of the importance of the issue raised by the Board, we will take this opportunity to treat it on its merits.

16. At issue in this case are two, sometimes competing, public interest concerns embodied in the Communications Act: the interest in achieving administrative finality expressed in Section 405 of the Act, and the interest in protecting the public from unqualified licensees expressed in the revocation provisions of Section 312 of the Act. Citing the policy favoring administrative finality, and relying upon a theory of imputed knowledge, the Board conclude that the Commission is precluded from initiating license revocation proceedings for rule violations that were known to Commission investigators when the license was granted. For the reasons that follow, we reverse the Board's ruling and conclude that revocation proceedings are not foreclosed in the situation presented here.

17. Section 312(a)(2) of the Act expressly permits us to revoke a license based on matters existing prior to the grant of the license which were unknown to us when the grant was made.[23] When this Section was revised, Congress expressly reserved the revocation penalty, *inter alia,* "for those situations in which the Commission learns of facts or conditions after the granting of a permit or license which would have warranted it in refusing the grant originally had it known these facts. . . ."[24] The existence of this statutory provision thus dispels any notion that Congress intended to insulate licensees from the possibility of license revocation based upon events or circumstances which existed prior to grant of the

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[23] "(a) The Commission may revoke any station license or construction permit—

* * *

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application. . . ."

47 U.S.C. § 312(a)(2).

[24] S. Rep. No. 44, 82d Cong., 1st Sess. 10 (1951).

license and which were unknown to the Commission, or that Congress intended to confer upon licensees an absolute right to hold their licenses for the entire license term. Accordingly, while we appreciate the Board's view of "the strong public interest in a reasonable finality of Commission action,"[25] we also recognize that, by enacting Section 312, Congress made plain that in some circumstances a licensee's interest in the finality of his grant is outweighed by the greater interest of protecting the public from unqualified licensees."

18. *Radio Para La Raza*, relied upon by the Board, strikes a reasonable balance between these two objectives. In that case the petitioner sought revocation of a license granted to a station thirteen months earlier. Citing Section 405 of the Act, which imposes limitations on our authority to review prior actions by requiring that petitions for reconsideration be filed within 30 days, we held that the Commission was precluded from reconsidering matters actually presented to it in the licensee's renewal application, including the proposed programming to which the petitioner objected. However, despite the Congressional policy favoring administrative finality reflected in Section 405, we expressly noted our authority under Section 312(a)(2) of the Act "to look at matters not presented to us at that time or at events following the grant of the application."[26] Thus, we clearly did not conclude in *Radio Para La Raza* that the licensee's interest in administrative finality is the Commission's sole or even paramount concern. We simply determined that, where an applicant's programming proposals had in fact been considered as part of the renewal decision-making process, we were precluded from reviewing such matters some thirteen months later in light of the strong Congressional policy favoring administration finality reflected in Section 405 of the Act.

19. Unlike *Radio Para La Raza*, the Board's decision in *Sousa* elevates the licensee's interest in securing finality of its license grant above the public interest embodied in Section 312(a)(2). As noted above, the FOB, which is responsible for investigating alleged violations, was still conducting its evaluation when Mr. Sousa's license was renewed by computer under the authority delegated to the PRB. It is obvious, then, that the PRB did not have actual knowledge of the investigation when the license was renewed.[27] To impute the FOB's knowledge to a completely separate Bureau under these circumstances, as the Board did, would result in an allegedly unqualified licensee remaining on the air because of a legal fiction. In our view, such a theory of imputation does not comport with the

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[25] 71 FCC 2d at 1334.

[26] 40 FCC 2d at 1105.

[27] We are not here presented with the further question of constructive knowledge, as could be the situation with respect to a grant of a broadcast license. There, in contrast to the procedures pertaining to CB licensing, the public notice and 30 day waiting period requirements of Section 309 of the Act are applicable.

clear Congressional intent underlying the statutory revocation scheme embodied in Section 312 of the Act.[28] Nor do we believe that the Board's imputation theory is required by Section 5(d) of the Act. The Board focused on subsection (d)(3) of Section 5, which provides that, absent Commission review, any staff action taken under delegated authority has the same force and effect as Commission action. The Board construed this subsection to suggest that any matter within the knowledge of a Commission employee must be attributed to all Commission employees and, indeed, to the Commission itself. It seems clear, however, that the Board's interpretation goes far beyond the limited purpose of subsection (d)(3), which is primarily to establish a point of finality of Commission staff decisions and actions prior to seeking judicial review. Moreover, as pertinent to this case, we note that Section 5(d) speaks only to the legal effect of the staff's action granting Sousa's license renewal. The Section plainly was not intended to address the circumstances under which any subsequent revocation proceedings might be undertaken. Such matters are governed exclusively by Section 312 of the Act, and, therefore, in deciding this matter, we believe the policies reflected in that Section are controlling.

20. Going beyond our legal obligations under Section 312(a)(2), we also find that the other grounds cited by the Board do not provide support for its Decision. The Board believed that the PRB's approach would extend the licensee's jeopardy intolerably; *i.e.*, the finality of license grant would depend upon the efficiency of the FOB in transmitting information to the PRB, and the greater the inefficiency in this regard, the longer the licensee's jeopardy. To begin with, the licensee's jeopardy here is no more than that expressly contemplated by the statute, which specifically permits revocation of licenses based on new information coming to our attention. In any event, we believe that, under the existing statutory scheme, adequate incentives exist to encourage prompt action by the agency: the consequences of delay are serious for the agency since it is required to institute a revocation proceeding, rather than a renewal proceeding, with resulting shifts in the burdens of proceeding and proof.

21. We also believe that the Board failed to consider the countervailing implications of its alternative proposal that applications be "flagged" when the FOB discovers rule violations that might bear on a licensee's qualifications. Given the sheer volume of private radio applications, and

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[28] The Board's reliance on *Radio Para La Raza* to support its imputation theory is misplaced. 71 FCC 2d at 1333. The facts of that case are clearly distinguishable. There, the licensing authority within the Commission—the Broadcast Bureau—had knowledge of and actually considered all aspects of the renewal application, including the alleged programming and the application deficiencies that were the basis for the later revocation request. Here, however, the licensing authority within the Commission—the PRB—did not have knowledge of, nor did it consider, the alleged violations by Mr. Sousa which were being investigated by the FOB.

the time necessary to investigate violations properly and to give the licensee adequate opportunity to respond preliminarily to allegations of infractions, the Board's suggested proposal would likely result in many unnecessary delays in granting licenses. Thus, although under the Bureau's existing procedure some instances may arise in which it becomes necessary to proceed by revocation rather than renewal proceedings, we believe this disadvantage is more than offset by the gains in achieving expeditious license grants for the vast majority of licensees.[29]

22. Therefore, for these reasons, and in accordance with Section 312(a)(2) of the Act, we hold that revocation proceedings are not foreclosed under the fact situation here presented.

23. ACCORDINGLY, IT IS ORDERED That:

(a) The Motion for Leave File Supplement to Application for Review filed June 19, 1980 by the Chief, Private Radio Bureau IS GRANTED, and the Supplement filed therewith IS ACCEPTED;

(b) The Application for Review filed by the Chief, Private Radio Bureau on June 22, 1979 IS GRANTED as set forth above;

(c) The Review Board's Decision (71 FCC 2d 1330) released on May 23, 1979 IS SET ASIDE;

(d) This proceeding is REMANDED to the Review Board for consideration of the merits of Mr. Sousa exceptions to the Initial Decision; and

(e) The Motion for Expedited Action filed by the Chief, Private Radio Bureau on January 18, 1980 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico, *Secretary*

[29] We wish to stress, however, that nothing in this opinion should be considered as tolerance of unreasonable delay in prosecuting proceedings.

Conductivity, Determination of Interference
Interference, AM Station, Adjacent Channel
Promotional Activity, Expanded Coverage Contours

Application to modify the facilities of AM station granted and petition to deny alleging prohibited overlap and inaccurate station promotional material denied. No prohibited overlap found where all measurements submitted were averaged. Distribution of inaccurate promotional material which showed expanded coverage contours found insufficient to warrant hearing.
—*WGFP*

Del. Auth. 83-001

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of

Pilgrim Broadcasting Company, Inc.
Radio Station WROL
c/o 400 Park Avenue
New York, New York 10022

For petition to deny application to modify the facilities of station WGFP

NOVEMBER 9, 1982

IN RE: LAKEVIEW BROADCASTING COMPANY, INC., WGFP, WEBSTER, MASSACHUSETTS, BP-800929AD

Gentlemen:

This concerns your petition to deny the above-referenced application to modify the facilities of station WGFP.

It is your contention that the proposed 0.5 mV/m contour of WGFP will overlap the 0.5 mV/m contour of your first-adjacent-channel station WROL, Boston Massachusetts, in violation of Section 73.37(a) of the Commission's Rules. You assert in this regard that the field intensity

measurements submitted with the application were taken over a long period of time, under greatly varying conditions, and during an especially hot dry summer, all factors which contributed to the unusually low ground conductivity evidenced by the measurements. Further you submit field intensity measurements taken by your consulting engineer which, you assert, show overlap of the two stations' 0.5 mV/m contours. Finally, you maintain that a WGFP promotional advertisement shows the station's 0.5 mV/m contour to have a 17 mile radius while operating at 250 watts, a coverage area considerably larger than that shown in the present application for increased power.

Lakeview Broadcasting Company, Inc., in its opposition pleading argues that there will be no prohibited overlap between WGFP and WROL. In support of its position, Lakeview submits an engineering statement containing additional field strength measurements on both WGFP and WROL. In addition, the license explains that its promotional map was based on conductivity values obtained from Commission figures rather than on the actual measurements taken later and is no longer being circulated to advertisers.

Pilgrim Broadcasting Company, Inc.

Before reaching the merits of this case, it is important to place the controversy in context. Unlike the FM and TV services, soil conductivity is a significant factor in determining the extent of various field intensity contours of AM stations. Because apparent soil conductivity varies due to several factors, the location of AM contours will never be as precise as is the case for FM and TV stations. The fact that actual field intensity measurements may vary over time is not typically a reflection on the validity of the measurements. Rather, it is a reflection in the changes in apparent conductivity. The following explanation is helpful in understanding this fact:

> The Commission's files are replete with data which show conclusively that the value of soil conductivity over a given path is influenced by a complex of seasonal and other variations. The Commission's rules, however, do not attempt to define "normal" weather conditions; nor do they demand that measurements be made at a particular time of the year. Rather, we must conclude, when measurement data are made at different periods and the conductivity indicated therefrom shows variations due to climatic or seasonal conditions, that the average effective conductivity over the path which will be considered valid for any period must be determined by combining and analyzing all the data. The conductivities indicated by figure M-3 (fig. R-3 of the Rules) are average values from different seasons and periods and the skywave field curves (figs. 1, 2, and 1(a) of sec. 73.190) are also based on average values measured over different periods. Any method which does not use an average effective conductivity determined from available data, regardless of the particular day or season when it was obtained, would result in the Commission allocating frequencies on a seasonal basis. *United Broadcasting Co.*, 1 F.C.C. 2d 555, 559 (1965).

Moreover, measurements vary from point to point on a specified radial. Section 73.186 provides for the location of measurement points at "approximate" intervals, and recognizes that different points may have to be selected if obstructions are present. Further, a measurement joint may be moved slightly to avoid the effects of reradiation from a nearby metal tower or from power lines. Accordingly, as here, two different consulting engineers may select different points along the same radial and, for that reason, obtain different apparent conductivity results. Our rules take into account the variations that may occur from seasonal differences and from measurement point selection. Section 73.181(d) provides that we don't expect "material deviation" from our AM standards, but that "these standards provide for flexibility.

Pilgrim Broadcasting Company, Inc.

In this case, we have carefully reviewed all of the measurement data submitted by both parties. These measurements substantially comply with the requirements of section 73.186 of the Rules, and clearly fall within the flexibility afforded by section 73.181(d). Accordingly, we have used the data from both parties in determining either the presence or absence of prohibited overlap. In this manner, we are able to use all relevant measurements taken consistent with the requirements of section 73.186. "[T]he combination of all the measurement data made on a particular radial and determining by analysis of all the data, the average extent of the pertinent contour rather than simply striking an average of the distances obtained from individual analyses—is consistent with past policy and more properly designed to achieve an accurate result." *United Broadcasting Co.*, above at 558. There is only one area where there is a disagreement as to ground conductivity. This area is on bearings of 239 degrees true from station WROL and 59 degrees true from station WGFP. Both parties made measurements along these radials although at different points and at different times. As you can readily determine by making the computations on your own, no prohibited overlap will occur if all the measurements submitted are averaged, in accordance with the Commission's policy as outlined above.

The protection provided to station WROL's licensed facilities is only to the extent provided by the Commission's Rules. Applying those rules, as interpreted by the Commission and relying in part on the measurements you have submitted, station WROL is receiving all the protection to which it is entitled. *Big River Broadcasters*, 44 F.C.C. 1671 (1959), aff'd *sub nom. Interstate Broadcasting Co. v. F.C.C.*, 280 F.2d 626 (D.C. Cir. 1960) (per curiam).

Finally, the distribution of the inaccurate promotional material is not sufficient to warrant a hearing. The licensee of station WGFP will be expected to follow Commission policy in the future. *See, e.g. Universal*

Communications Of Pittsburgh, 74 F.C.C.2d 617 (1969), *recon. denied* 21 F.C.C.2d 542 (1970).

For the above reasons and pursuant to delegated authority, your petition to deny is denied. Further, since Lakeview Broadcasting Company is qualified to make the proposed change, the application is granted.

BROADCAST FACILITES DIVISION, BROADCAST BUREAU

Larry D. Eads, *Chief*

Amateur Radio Service
Citizens Radio Service, Operating Rules
License, Revocation Grounds For Operators Permit, Suspension of

Review Board Decision, 78 FCC 2d 1440, reversing an Initial Decision, set aside. Section 312 of the Act authorizes revocation of license based on matters existing prior to grant of renewal which were unknown to Commission. Also Section 303 of the Act authorizes suspension of an Amateur Operators license for statutory and/or rule violations committed in another service.
—*William M. Rogers*
PR Docket No. 79–48

FCC 82–481

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matters of	
Revocation of License of	
WILLIAM M. ROGERS 2329 N.W. 35th Oklahoma City, Oklahoma 73112	PR Docket No. 79–48
License of Station WD5FPO in the Amateur Radio Service	
Suspension of License	
WILLIAM M. ROGERS 2329 N.W. 35th Oklahoma City, Oklahoma 73112	PR Docket No. 79–49
Amateur Technician Class Operator License	
Application of	
WILLIAM M. ROGERS 2329 N.W. 35th Oklahoma City, Oklahoma 73112	PR Docket No. 79–50

For an Amateur General Class Operator License

Memorandum Opinion and Order

Adopted: October 28, 1982; Released: November 4, 1982

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

1. In conjunction with this revocation proceeding, the Review Board (Board) certified to us the question of whether Section 303(m) of the Communications Act of 1934, as amended,[1] authorizes suspension of an Amateur operator license for statutory and rule violations committed in connection with the operation of a radio station in another service for which an operator's license is not required.[2] Also, the Private Radio Bureau (PRB) has filed an Application for Review of the Board's Decision here.[3] That Decision reversed in part an Initial Decision[4] which recommended the revocation of William M. Rogers' Amateur station license, the suspension of his Amateur Technician Class operator license, and the denial of his application for an Amateur General Class operator license. Although no exceptions to the Initial Decision were filed, the Board ordered review, on its own motion,[5] in order to examine the applicability of its opinion in *Theodore E. Sousa*[6] *to this case. In its Decision,*[7] *the Board affirmed the denial of Mr. Rogers' application to upgrade his operator license to General Class, but refused to revoke his Amateur station license. As mentioned, it also certified to us the question of whether Mr. Rogers' Technician Class operator license should be suspended and, if so, for what period. For the reasons discussed below, we believe that review is warranted and that Mr. Rogers' Amateur station license should be revoked. As for the certified question, we hold that the Act authorizes suspension of an Amateur operator license for statutory and rule violations committed in connection with the operation of a radio station in another radio service.*

Background

2. William M. Rogers is a service station operator in Oklahoma City, Oklahoma.[8] He is currently the holder of Amateur station license

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[1] 47 U.S.C. § 303(m). Hereinafter referred to as the Act.

[2] Certification is pursuant to Section 0.361(b) of the Rules. 47 C.F.R. § 0.361(b).

[3] Review is sought pursuant to Section 1.115(b)(5)(i) and (ii) of the Rules. 47 C.F.R. § 1.115(b)(5)(i) and (ii). Mr. Rogers opposes review.

[4] 78 FCC 2d 1440 (1980).

[5] Order, FCC 80R–18, released March 13, 1980.

[6] 71 FCC 2d 1330 (Rev. Bd. 1979).

[7] 78 FCC 2d 1424 (Rev. Bd. 1980).

[8] Rogers Exh. 8.

WD5FPO and a Amateur Technician Class operator license.[9] Since September 19, 1978 he has had pending an application to upgrade his operator's license to General Class and to renew his Amateur station license.[10] As will be seen, he also held Citizens Band (CB) radio station license KIX-8287, issued in 1975.[11]

3. In January 1976, the Commission sent Mr. Rogers a Notice of Apparent Liability which assessed a $150 forfeiture for three CB rule violations that occurred on December 6, 1975.[12] Mr. Rogers was charged with the unauthorized use of a frequency then assigned to the Industrial Radio Service; transmission through an overheight antenna; and use of the term "46 W 103," rather than his Commission call sign, to identify his transmission. Responding to this Notice on February 4, 1976, Mr. Rogers wrote that he had disposed of the CB equipment because he did not wish to violate any rules that might prevent him from becoming an Amateur licensee.[13] As to his off-frequency operation, he stated:

> In Oklahoma City it has become impossible to communicate in business on assigned channels, if any or at all, due to the congestion brought about by the enormous popularity of Citizens Band communications.[14]

Mr. Rogers paid the $150 forfeiture in three installments, after receiving a letter from what is now the Commission's Private Radio Bureau advising him that no action would be taken to collect the forfeiture if his CB license were submitted for cancellation.[15]

4. On June 21, 1977 the Commission issued Mr. Rogers an Amateur station license (WD5FPO) and a Novice Class Amateur operator license.[16] Each license had a two year term. Nevertheless, about nine months later (on March 8, 1978), Mr. Rogers applied for the renewal of his Amateur station license when he sought to upgrade his operator's license to Technician Class.[17]

5. While these applications were pending, Mr. Rogers was again found to be operating in violation of the rules.[18] On March 31, 1978 he transmit-

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[9] Private Radio Bureau Exh. 22 (hereinafter "PBR Exh.").

[10] *Id.* Although pending, the application for renewal of Mr. Rogers' Amateur station license was not consolidated into this proceeding.

[11] PRB Exh. 22.

[12] PRB Exh. 1.

[13] PRB Exh. 2.

[14] PRB Exh. 2.

[15] PRB Exh. 13.

[16] PRB Exh. 22.

[17] It is unclear why Mr. Rogers sought renewal so far in advance of the license's expiration date. As will be seen, he did the same thing in September 1978 when he applied for a General Class operator license. The Board surmised that he desired to have his station and operator licenses run concurrently. 78 FCC 2d at 1426 n.2.

[18] PRB Exh. 11.

ted voice communications[19] on a frequency assigned to the Federal Aviation Administration (FAA).[20] In addition, Mr. Rogers did not use his assigned call sign to identify his station; instead, he used the term "103." He also failed to observe a one minute silent period between each five minute period of communication.

6. Because the Commission did not know whether CB or Amateur radio equipment was used in the March 31 violations, Mr. Rogers was sent alternative Notices of Violations on April 24, 1978. The CB Violation Notice charged North May Champlin[21] with five rule violations: transmission on a frequency not assigned the CB radio service; use of an improper transmitter; communications exceeding five consecutive minutes; failure to observe a one minute silent period between contacts; and failure to transmit an assigned call sign.[22] The Amateur Notice of Violation also cited five operating violations: transmission on a frequency not assigned to the Novice Class Amateur service; transmission on a frequency not assigned to the Amateur service; transmission of an emission not authorized to Novice Class operators; failure to transmit the station's assigned call sign; and transmission of an unauthorized call sign.[23]

7. Mr. Rogers' responses to these Notices were inconsistent. On May 1, 1978 he replied to the CB Notice of Violation.[24] In pertinent part, he stated:

> For the past two years, through the North May Champlin store, we have brough [sic] and sold C.B. radios. In the process of selling these radios, it was not always possible to monitor each person who transmitted. We realize some violations may have occurred during this time.
>
> However, as of April 5, 1978, the business operation of the North May Champlin at 7928 N. May, Okla. City, Okla. was dissolved; no longer existing. I am hereby returning the exclused [sic] Citizens Band radio license and Call sign KIX 8287.[25]

8. On May 3, 1978 Mr. Rogers replied to Amateur Notice of Violation.[26] In pertinent part, he stated:

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[19] Mr. Rogers' Novice Class Amateur operator license only authorized him to transmit by radiotelegraphy. PRB Exh. 11 at p.5.

[20] There is an FAA operations center in Oklahoma City, Oklahoma. PRB Exh. 11 at p.4. Neither Mr. Rogers' CB license, nor his Amateur license authorized him to transmit on this frequency.

[21] Mr. Rogers' CB station was licensed in the name of "North May Champlin, Partner William M. Rogers," a service station of which Mr. Rogers was sole proprietor. He also bought and sold CB radio equipment at this service station.

[22] PRB Exh. 4. The rules violated were, respectively, 47 C.F.R. § 95.455(a); 47 C.F.R. § 95.641(c)(4); 47 C.F.R. § 95.469(b); 47 C.F.R. § 95.469(b); and 47 C.F.R. § 95.471(c). The Initial Decision mistakenly states that Mr. Rogers was charged with only two CB violations. I.D. para. 14.

[23] PRB Exh. 6. The rules violated were, respectively, 47 C.F.R. § 97.7(e); 47 C.F.R. § 97.61(a); 47 C.F.R. § 97.7(e); 47 C.F.R. § 97.87(a); and 47 C.F.R. § 97.121.

[24] PRB Exh. 5.

[25] *Id.*

[26] PRB Exh. 7.

> In reply to your notice of violation of April 24, 1978. I realized that I committed a serious violation of FCC Regulations when I operated my station on an un-authorized frequency the evening of March 31st. I sincerely regret this violation. There were several stations talking on this frequency and I just gave in to the temptation to join in the conversation. I know that this in no way excuses my actions.
>
> I have a strong desire to pursue my efforts to obtain a General Class Amateur License. To this end I have recently passed the examination for Technician Class License. I have removed the 11 me ter [sic] capability from my radio equipment and would like to assure you that I have no intentions of committing any more violations of FCC Regulations in the future. . . .[27]

9. While the Commission was considering Mr. Rogers' March 31 violations, his March 8 applications were pending for the renewal of his Amateur station license and for the upgrading of his operator's license.[28] On May 30, 1978 the Commission renewed Mr. Rogers' Amateur station license and upgraded his Novice Class operator license to Technician Class.[29] Each license was for a five-year term. On September 19, 1978 Mr. Rogers submitted an application to upgrade his Technician Class operator license to General Class. At the same time, he filed another application for the renewal of his Amateur station license.[30]

10. On October 30, 1978 the Commission issued an Order directing Mr. Rogers to show cause why his Amateur station license should not be revoked and why his Technician Class operator license should not be suspended for the March 31 violations.[31] Responding on November 14, 1978 Mr. Rogers requested a hearing and stated in pertinent part:

> I am in the service station business in the Oklahoma City area. It would be a deep hardship financially and on my business to have a hearing at any other location as I operate six (6) days a week with minimum help in a demanding service business. . . .
>
> I would like to clearly state the violations charges [sic] were made on Citizen Band equipment. The charge on Janaury 14, 1976 was settled by payment of the violation at that time. The charge on March 31, 1978 was regrettable as it *was a one and only mistake* by me which can be verified by amateur operators in this area. The name of North May Chaplin was changed on December 17, 1978 to Bill Rogers Automotive and the *business was not dissolved. The forfeit of C.B. License KIX 8287 under the name of North May Champlin was surrenderd [sic] in leiu [sic] of this C.B. violation May 31, 1978, as requested!* . . .[32]

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[27] *Id.*

[28] On April 12, 1978, Mr. Rogers passed the written examination to upgrade his Novice license to Technician Class. PRB Exh. 22, and PRB PF-Attachment I.

[29] PRB Exh. 22, p. 2.

[30] PRB Exh. 22; *see* fn. 10, *supra*.

[31] Order to Show Cause and Suspension Order, SS–049–79, issued October 30, 1978; PRB Exh. 14.

[32] PRB Exhs. 8 and 15 (Emphasis in original). The Administrative Law Judge requested additional written evidence (Rogers Exhs. 8 and 9) on the PRB's contention that Mr. Rogers had voluntarily submitted his CB license for cancellation because North May Champlin had been dissolved on April 5, 1978. 78 FCC 2d at 1445–1446. The Commission cancelled CB license KIX–8287 on May 31, 1978. PRB Exh. 22, Rogers Exh. 8.

11. On November 22, 1978 the Commission vacated its October 30th Order because it failed to include Mr. Rogers's September 19, 1978 application for an Amateur General Class operator license.[33] *On March 23, 1979 this proceeding was instituted by issuance of another Order to Show Cause.*[34] *This Order directed Mr. Rogers to show cause why his Amateur license for station WD5FPO should not be revoked, under Section 312(a)(4) of the Act,*[35] *for willful violations of Section 301 of the Act*[36] *and the Commission's Rules; it suspended his Technician Class operator license, under Section 303(m)(1)(a) of the Act,*[37] *subject to a request by him for a hearing; and it designated for hearing, under Section 309(e) of the Act,*[38] *his application to upgrade his operator license to General Class.*[39] *Mr. Rogers requested a hearing on April 30, 1979.*[40]

The Initial Decision

12. After a written hearing,[41] Administrative Law Judge (ALJ) Walter C. Miller released an Initial Decision (I.D.) On February 1, 1980.[42] The I.D. revoked Mr. Rogers' Amateur station license, suspended for term his Amateur Technician Class operator license, and denied his application for an Amateur General Class operator license. The ALJ found that Mr. Rogers' 1975 CB rule violations affected his qualifications to remain a licensee.[43] From his explanation of why he had deliberately operated off-frequency, the ALJ observed that "Rogers did not seem the least bit concerned that he had operated on a frequency reserved for people other than himself."[44] The ALJ further observed that Mr. Rogers violated two other rules (antenna height limitations and call sign identification) which are intended to reduce harmful interference to other users.[45] Nonetheless, the ALJ stated that payment of a $150 forfeiture entitled Mr. Rogers to a second chance to show that he could abide by the Commission rules.[46]

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[33] Order, SS–049–79, issued November 22, 1978; PRB Exh. 16.

[34] Order to Show Cause, Suspension Order and Designation Order, PR 13605, released March 23, 1979; PRB Exh. 17. The Order was issued by the Chief, Private Radio Bureau under delegated authority.

[35] 47 U.S.C. § 312(a)(4).

[36] 47 U.S.C. § 301,

[37] 47 U.S.C. § 303(m)(1)(a).

[38] 47 U.S.C. § 309(e).

[39] The Order specified that the matters in this proceeding would be reolved upon the following five issues:

[40] PRB Exh. 18.

[41] In accordance with letters dated August 3 and October 16, 1979, Mr. Rogers and the PRB agreed to conduct the hearing through the submission of written exhibits in lieu of oral testimony. Joint Exhs. 1 and 2. The Judge approved the agreed upon written hearing by Order, FCC 79M–604, released May 16, 1979.

[42] 78 FCC 2d 1440 (1980).

[43] I.D. Conclusions ¶. 8, 78 FCC at 1447.

[44] I.D. Conclusions ¶. 7, 78 FCC 2d at 1447.

[45] I.D. Conclusions ¶. 1–3, 7, 78 FCC 2d 1446–1447.

[46] I.D. Conclusions ¶. 8, 78 FCC 2d 1447.

Having stated this, the ALJ then proceeded to make the following findings.

13. The ALJ found that Mr. Rogers again operated off-frequency without using his Commission call sign on March 31, 1978. This time he operated on a FAA frequency in such a manner that he could have interfered with transmissions designed to protect public safety.[47] Mr. Rogers also transmitted in excess of five consecutive minutes and he failed to observe a one-minute silent period.[48] The ALJ further found that "Roger was well aware he was deliberately violating the Commission's rules because he again failed to use his Commission call sign to indentify his transmission."[49] When confronted with these violations, Mr. Rogers offered the unacceptable explanation that "[T]here were several stations talking on this frequency and I just gave in to the temptation to join in the conversation."[50] Thus, the ALJ concluded[51] that Mr. Rogers' March 31 violations were serious and warranted revocation, suspension, and denial in accordance with the case of *Raymond C. Standring*.[52]

14. The ALJ also found four instances of evasiveness and lack of candor which provided an additional reason for this result.[53] First, in his letter dated May 1, 1978 Mr. Rogers represented that he had dissolved his business on April 5, 1978. It later developed, however, that the business had only changed its name and that this event had occurred on December 17, 1977.[54] Secondly, Mr. Rogers' May 1, 1978 letter stated that he was surrendering his CB license because his business had been dissolved. However, on November 14, 1978 Mr. Rogers asserted that he had surrendered his CB license at the Commission's request, as a penalty for his March 31, 1978 violations.[55] The ALJ found that this later assertion also proved to be inaccurate.[56] Finally, on May 3, 1978 Mr. Rogers claimed that his March 31, 1978 violations had taken place on his Amateur station and not his CB station. Later, when faced with revocation of his Amateur station license, he contended the violations occurred on CB equipment.[57]

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[47] I.D. Conclusions ¶. 9, 78 FCC 2d 1447–1448.

[48] I.D. Conclusions ¶. 10, 78 FCC 2d 1448. As the Board correctly points out, this is a violation of Section 95.469(b) of the CB Rules, not the Amateur Rules applicable to WD5FPO. 78 FCC 2d at 1426 n.1.

[49] I.D. Conclusions ¶. 10, 78 FCC 2d 1448.

[50] I.D. Conclusions ¶. 11, 78 FCC 2d 1448.

[51] I.D. Conclusions ¶. 12, 78 FCC 2d 1448.

[52] 68 FCC 2d 1021 (1978). In the *Standring* case, the Commission declared that transmission on an unauthorized frequency "reflects adversely on the qualifications of an individual to be or remain a Commission licensee in any radio service and warrants license revocation . . . ."

[53] I.D. Conclusions ¶. 14, 78 FCC 2d 1448.

[54] I.D. Conclusions ¶. 15, 78 FCC 1448–1449.

[55] I.D. Conclusions ¶. 16, 78 FCC 2d 1449.

[56] *Id.*

[57] I.D. Conclusions ¶. 17, 78 FCC 2d 1449.

In the ALJ's opinion these instances of lack of candor formed a separate and independent ground for revocation, suspension, and denial.[58]

15. Moreover, the ALJ noted that, although this case may have been mishandled procedurally by the FOB and the PRB, the Board's holding in *Theodore E. Sousa* did not apply.[59] The ALJ recognized that the lack of administrative coordination between the processing and enforcement personnel of those Bureaus might support an argument under *Sousa* that the Commission really didn't consider Mr. Rogers' March 31, 1978 violations serious or they wouldn't have renewed his Amateur station license for WD5FPO on May 30, 1978.[60] However, the ALJ did not consider this argument applicable because of the seriousness of Mr. Rogers' violations; a need to effectuate the Show Cause Order; the procedural nature of the *Sousa* Decision; and the need to ascertain the "bottom line" in this proceeding despite its procedural irregularities; *i.e.*, William M. Rogers qualified to be a Commission licensee[61]

The Review Board Decision

16. The Board refused to revoke Mr. Rogers' Amateur station license. It held that Section 312(a)(4) of the Act[62] did not authorize revocation of that license solely for rule violations which occurred, and were detected by the Commission, prior to the grant of a license renewal.[63] Although no specific legislative history was found that addressed this question, the Board reasoned that Section 312(a)(4) was limited to violations which occurred during a current license term, and not a previous license term.[64] This was because of the strong public policy in favor of administrative finality expressed in the 30 day limit for reconsideration contained in Section 405 of the Act[65] and in the Commission's consistent interpretation of Section 1.108 of its Rules.[66] "Any other construction," the Board contended, "would require the finding that Congress intended to legitimatize the capricious procedure of making grants known not to be in the public interest and revoking them at leisure."[67]

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[58] I.D. Conclusions ¶. 18, 78 FCC 2d 1449.

[59] 71 FCC 2d 1330 (Rev. Bd. 1979). There, the Board held that a station license may not be revoked solely upon the basis of licensee misconduct occurring entirely within a previous license term where the misconduct was known by Commission investigators prior to a grant of license renewal.

[60] I.D. Conclusions ¶. 20, 78 FCC 2d 1449.

[61] I.D. Conclusions ¶. 21–23, 78 FCC 2d 1449–1450.

[62] 47 U.S.C. § 312(a)(4). provides that any station license may be revoked "for willful or repeated violation of, or willful or repeated failure to observe any provision of this Act or any rule or regulation of the Commission authorized by this Act or by treaty ratified by the United States. . . ."

[63] *Id.* at 1429.

[64] *Id.*

[65] 47 U.S.C. § 405.

[66] 47 C.F.R. § 1.108

[67] 78 FCC 2d at 1429.

17. The Board further pointed out that the proper procedure to remedy an erroneous grant was either reconsideration within 30 days of grant, or a revocation proceeding under Section 312(a)(2) of the Act[68]—not revocation under Section 312(a)(4) of the Act.[69] Although not relied upon here as a basis for revoking Mr. Rogers' license, Section 312(a)(2) not only authorizes revocation for any misconduct occurring during a current license term,[70] it also authorizes revocation for misconduct occurring in a prior license term where the misconduct was unknown to the Commission at the time of license renewal.[71] But, the Board stressed, even under Section 312(a)(2) of the Act, the misconduct had to be unknown to the Commission at the time of grant.[72] Accordingly, it rejected the PRB's contention that matters from a previous license term were barred only if they were actually considered at the time of license renewal, and not just known in some way to some agency official.[73] The Board said that the test was whether a matter had been presented to, or had been before, the agency at the time of the renewal grant.[74] Thus, in the Board's opinion, if at the time of a license grant factual knowledge was in the possession of Commission employees whose official duty it was to ascertain those facts, such knowledge was considered to have been before the Commission so as to have been implicitly ruled upon at the time of grant.[75]

18. The Board in sum held that Mr. Rogers' Amateur station license could not be revoked under Section 312(a)(4) of the Act—the only statutory revocation provision specified in the Show Cause Order—because that provision applied only to violations committed during a current license term. Nor could this station license be revoked for a lack of candor in dealing with the Commission. The Board stated that Section 312(c) of the Act requires that, before a license is revoked, the Commission must serve upon the licensee an Order to Show Cause which "shall contain a statement of the matters with respect to which the Commission is inquiring."[76] The Board noted that the ALJ's findings concerning Mr. Rogers' lack of candor were based almost entirely upon written materials submitted prior to the designation for hearing. Since the Show Cause Order contained neither a discussion, nor an issue of possible lack of candor, the

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[68] 47 U.S.C. § 312(a)(2). Section 312(a)(2) authorizes the Commission to revoke any station license "because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application. . . ."

[69] 78 FCC 2d at 1429.

[70] Citing *Immaculate Conception Church of Los Angeles* v. *FCC*, 320 F.2d 795 (D.C. Cir. 1963).

[71] Citing *Denver Television Co.*, 18 FCC 766 (1954); and *Theodore E. Sousa*, 71 FCC 2d 1330, 1332 (Rev. Bd. 1979).

[72] 78 FCC 2d at 1429.

[73] 78 FCC 2d at 1431.

[74] 78 FCC 2d at 1431.

[75] The Board referred to its *Sousa* opinion, *supra*, for an explanation of why the FOB's knowledge of Mr. Rogers' violations must be imputed to the PRB.

[76] 47 U.S.C. § 312(c).

Board held that Mr. Rogers could not be disqualified for matters not placed in issue without violating Section 312(c) and the requirements of a fair hearing.[77] The Board then reviewed the record to determine whether a candor issue should be added and the case remanded for further hearing. It found that, while various statements of Mr. Rogers raised questions, they did not present substantial questions of a disqualifying lack of candor sufficient to reopen the record, when they were taken in total as a layman's responses.[78]

19. On the other hand, the Board did uphold the denial of Mr. Rogers' application for a General Class Amateur operator license because of facts known to the Commission prior to its grant of his Technician Class license. The Board stated that denial of an application was different from revoking a license.[79] The finality of a license grant was limited to the term of the license. Consequently, when a license expired, the doctrine of administrative finality no longer applied, and the licensee must bear anew the burden of proving that the renewal of his license is in the public interest.[80] This, Mr. Rogers failed to do for the record fully supported the ALJ's findings that Mr. Rogers committed serious rule violations. Thus, the Board held that these violations, regardless of the service in which they were committed, justified denial of Mr. Rogers' application to upgrade his operator's license.[81]

20. As heretofore mentioned, the Board also certified the question of whether Mr. Rogers' operator license should be suspended and, if so, for what period. Although Section 303(m) of the Act broadly refers to violations of "any" statute or regulation, the Board thought it unlikely that Congress intended license suspension to be used as a sanction for rule violations committed in another radio service.[82]

Application for Review

21. The PRB's Application for Review charges that the Board ignored Mr. Rogers' misconduct, misconstrued the Commission's revocation process, erred in requiring separate candor issues, and read too narrowly the Commission's suspension authority. PRB contends that Mr. Rogers' willful and repeated statute and rule violations demonstrate that he is unfit to be a Commission licensee. The Board's Decision refused to consider this

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[77] 78 FCC 2d at 1436.

[78] 78 FCC 2d at 1436–1437.

[79] 78 FCC 2d at 1432.

[80] *Id.*

[81] 78 FCC 2d 1437–1438.

[82] 78 FCC 2d at 1438. The Board also noted that, if Mr. Rogers' Amateur station license were revocable, an additional question would be presented as to whether Section 312(a)(4)of the Act authroizes revocation of a station license in one service for violation of the statute or rules in the operation of a station in another service. *Id.* n. 15. The Board claimed not to be addressing the cross-service impact of misconduct broadly raising character questions. *Id.*

evidence and created a result whereby Mr. Rogers' licenses may not be revoked for operating violations, but his renewal applications can be denied five years later for the same violations. PRB further claims that the Board's administrative finality analysis failed to distinguish between setting aside a grant under reconsideration, and subjecting a licensee's conduct to scrutiny in a revocation proceeding. Citing *Great Kampeska Radio Corp.* v. *FCC*,[83] PRB claims that the law permits the Commission to consider conduct in a prior license term as an additional basis of experience upon which to determine the character and fitness of a licensee in a renewal or revocation proceeding.[84] The PRB next claims that candor issues need not be separately designed for hearing, since the Commission has a right to expect candor from all of its licensees. Citing *RKO General, Inc.*[85] and *Rocket Radio, Inc.*,[86] *it contends that truth and candor are always at issue. Consequently, Mr. Rogers' evasiveness, revealed throughout the proceeding, constituted an independent ground for revocation. Finally, PRB argues that the Board's certified question is an overly narrow reading of the statute. Citing Raymond C. Standring*,[87] it claims that, if out of frequency operation justifies station license revocation, surely the same rationale provides a basis for the suspension of Mr. Rogers' operator license.

22. Mr. Rogers supports the Board's Decision, contending that Section 312(a)(4) was properly construed by the Board to limit revocation proceedings to willful and repeated rule violations which take place in a current license term, not a prior license term. He also argues that *Greater Kampeska Radio Corp.* v. *FCC* does not bear on his situation, since the court's holding therein merely established that the Commission is not precluded from looking at the licensee's past renewal history in considering whether a renewal should be granted to a party guilty of current rule violations. Furthermore, he claims that he was candid concerning his rule violations; that the PRB failed to present any substantive evidence to show otherwise; and that Congress did not intend for Section 303(m) of the Act to authorize suspension of an operator license for rule violations committed in another radio service.

Discussion

23. The Application for Review presents essentially two questions. Did the Board err in holding that Mr. Rogers' Amateur station license could

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[83] 108 F.2d 5, 7 (D.C. Cir. 1939).

[84] PRB also notes inconsistencies between the Board's opinion here and its Decision in *Albert F. merrill*, 79 FCC 2d 508 (1980), and *Theodore E. Sousa*, *supra*. For example, PRB notes that the *Sousa* opinion concluded that, once a licensee's conduct had been passed on by the Commission, it would be inequitable to review this same conduct again in a license renewal with a view to action adverse to the licensee. Here, however, the PRB claims the Board held otherwise.

[85] 78 FCC 2d 1, 104 (1980).

[86] 70 FCC 2d 413, 418–419 (Rev. Bd. 1977).

[87] 68 FCC 2d 1021, 1024 (1978).

not be revoked for willful or repeated violations of the Act and our Rules, where such misconduct occurred entirely within a previous license term and was known to Commission investigators prior to the grant of a license renewal? And, secondly, did the Board err in holding that Mr. Rogers was qualified to remain a licensee in spite of inconsistent responses submitted during a written hearing? As we answer both questions affirmatively, we find that review is warranted because of errors of substantive law.[88]

24. In *Theodore E. Sousa*, FCC 82–480, adopted today, we rejected the Board's rationale that is the basis of its Decision here under review. There, we held that the grant of a license renewal does not preclude a later revocation proceeding based upon rule violation that occurred, and were known to Commission investigators, prior to the license renewal.[89] There also, we held that *Radio Para La Raza*[90] should be construed to bar consideration of matters from a previous license term only if they were actually considered during a grant of a license renewal, and were not just known at the time by staff investigators. Moreover, in *Sousa*, we rejected the Board's premise that all information known to staff investigators should be automatically imputed to the PRB[91] decision makers.

25. Thus, we disagree with the Board that Mr. Rogers' Amateur station license cannot be revoked because staff investigators knew of his violations at the time another Commission office renewed his license. Section 312(a)(4) of the Act plainly states that the Commission may revoke any station license for willful or repeated violations of the Act or our rules.[92] Nor are we persuaded that the Board's legal rationale, rejected in *Sousa*,

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[88] We do not believe that oral argument or the filing of briefs would materially assist us in disposing of the matters here presented. Accordingly, that aspect of the parties' requests will be denied.

[89] In *Sousa*, the Board concluded that the administrative finality of a license renewal precluded consideration of violations from a previous license term where those violations were known to staff investigators at the time of renewal. The Board reasoned that the merits of the violations had been passed upon during the license renewal process because the knowledge of the staff investigators had to be imputed to the Commission. *Theodore E. Sousa*, *supra*, 71 FCC 2d 1332–1334. Although this rationale would appear applicable to both license renewal and revocation proceedings, the Board in this case announced that it applies only to license revocations because the administrative finality of a license grant is limited only to the period of each license term. *William M. Rogers*, *supra*, 78 FCC 2d at 1432. This refinement of the Board's rationale, however, is also premised upon imputed knowledge, a theory which we have rejected.

[90] 40 FCC 2d 1102 (1973).

[91] As in *Sousa*, *supra*, we are not here presented with the further question of constructive knowledge, as could be the situation with respect to a grant of a broadcast license. There in contrast to the procedures pertaining to CB licensing, the public notice and 30 day waiting period requirements of Section 309 of the Act are applicable.

[92] 47 U.S.C. § 312(a)(4). We reject the Board's contention that it was a significant procedural error not to have designated this case solely under Section 312(a)(2) of the Act; *i.e.*, because Mr. Rogers' alleged violations were conditions coming to the attention of the Commission which would warrant denial of an original application. 47 U.S.C. § 312(a)(2).

While this interpretation is plausible, we believe that Mr. Rogers' violations are nevertheless within the ambit of Section 312(a)(4), since they were willful or repeated violations of the Act and our rules and were unknown to the licensing authority within the Commission at the time of grant.

is somehow more applicable to Section 312(a)(4) than it is to Section 312(a)(2) of the Act. Absent the Board's legal theory of administrative finality and imputed knowledge, the record here amply supports the ALJ's finding that Mr. Rogers' violations render him unqualified to remain a licensee and justify revocation of his license for Station WD5FPD in the Amateur Radio Service.[93]

26. Nor do we agree that Mr. Rogers' candor was not in issue. The issue of candor need not be separately designated for hearing since the Commission has a right to expect candor from all of its licensees.[94] Indeed, the Board itself has held that "[T]ruth and candor are always in issue. . . ."[95] And, as we said in *Grenco, Inc.*, "(N)otice to a renewal applicant that he must . . . not conceal material information is superfluous. . . . (N)o unfairness results in holding a renewal applicant to have knowingly assumed the risk of an adverse determination as to its character qualifications, when a principal testifies falsely at the hearing."[96] The same principle applies to pleadings filed with the Commission.[97] Basic to the functioning of the regulatory process is the ability of the Commission to rely on the representations of those whom it licenses and those who come before it seeking licenses.[98] Hence, the Commission must demand candor from its licensees in their response to Official Notices of Violations. And, above all, when a licensee is called before the Commission, the Commission must be able to rely upon the representations made by that licensee during the hearing process.[99]

27. In view of the foregoing, we are not persuaded that the ALJ erred in examining Mr. Rogers' candor in the absence of a specified hearing issue. Nor do we agree with the Board that the ALJ's findings concerning Mr. Rogers' lack of candor were based almost entirely upon matters predating the designation of this proceeding. Instead, what the ALJ found was a pattern of misrepresentations that began with Mr. Rogers' prehearing statements, continued with his responses to Judge Miller's interrogatories during the hearing,[100] and culminated with his October 23, 1979

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[93] *See Raymond C. Standring, supra.*

[94] *RKO General, Inc.* (WNAC-TV), 78 FCC 2d, 104 (1980).

[95] *Rocket Radio, Inc.*, 70 FCC 2d 413, 418 n.19 (Rev. Bd. 1977).

[96] *Grenco, Inc.*, 39 FCC 2d 732, 736 (1977).

[97] *RKO General, Inc. (WNAC-TV), supra*, 78 FCC 2d at 104.

[98] *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946); *The Prattville Broadcasting Co.*, 4 FCC 2d 555, *reconsideration denied*, 5 FCC 2d 601 (1966).

[99] *Nick J. Chaconas*, 28 FCC 2d 231, 233, *reconsideration denied*, 35 FCC 2d 699, *affirmed without opinion*, 486 F.2d 1314 (1973). *See, e.g., Revocation of Station License of Station WSAL*, 8 FCC 34, 36 (1940). Indeed, Section 312(a)(1) of the Act authorizes license revocation "for false statements knowingly made. . . ." 47 U.S.C. § 312(a)(1). Among other things, Section 308(b) of the Act authorizes the Commission to require from a licensee further written statements of fact to enable it to determine whether his license should be revoked. 47 U.S.C. § 308(b).

[100] "Answers to Questions Posed by Presiding Judge Walter C. Miller," Rogers Exh. 8.

affidavit.[101] Briefly stated, the record evidence upon which the ALJ's findings are posited is as follows.

28. On April 24, 1978 the Commission mailed Mr. Rogers alternative Notices of Violations because it was not known under which of his licenses his March 31, 1978 violations had occurred. On Mayh 1 Mr. Rogers responded to the CB Notice of Violation by stating that the violation could have been committed by a customer during the sale of the CB radio equipment at his North May Champlin store.[102] He further stated that this business was "no longer existing" as of April 5, 1978, and that he was returning his CB license.[103] Two days later (on May 3), Mr. Rogers replied to the Amateur Notice of Violation stating, "I realize that I committed a serious violation of FCC regulations when I operated my station on an unauthorized frequency the evening of March 31. . . ."[104] In so doing, he admitted that the March 31 violations had occurred on his Amateur station. Relying on this, the Commission accepted the return of Mr. Rogers' CB license on June 13, and issued its first Show Cause Order to initiate revocation of his Amateur license. Mr. Rogers responded to this Order on November 14, 1978.[105] He then stated that the violations occurred on CB equipment and that he had surrendered his CB license in lieu of a penalty for these violations. He also said that North May Champlin had not been dissolved as he had claimed on May 1.

29. After these conflicting statements were submitted in evidence, the ALJ became concerned that a complete record was not being made. Accordingly, he directed a series of written questions to Mr. Rogers concerning the inconsistencies in his prehearing statements. Mr. Rogers responded on October 9, 1979.[106] He generally cotended that his March 31 violations had occurred on CB equipment and that he had surrendered his CB license as the agreed upon penalty for the violations pursuant to an "Explanation of Procedures" he had received from the Commission. But when it developed that he had surrendererd his license long before he ever received the "Explanation of Procedures" he again changed his story;[107] he then asserted that his request for cancellation was based on the Commission's March 30, 1976 correspondence regarding his December 6, 1975 CB violations, and some telephone advice with an unnamed Commission employee.[108] Thus, taken as a whole, we think that the record fully supports the ALJ's findings that Mr. Rogers has been less than

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[101] Rogers Exh. 9.
[102] PRB Exh. 5.
[103] *Id.*
[104] PRB Exh. 7.
[105] PRB Exh. 8.
[106] Rogers Exh. 8.
[107] PRB Exhs. 14, 17, 21, and 22; compare Rogers Exh. 8 with Rogers Exh. 9.
[108] Rogers Exh. 9.

candid in his dealings with the Commission, both before and during this hearing.

30. Nor do we think that Mr. Rogers was deprived of his procedural rights because of a lack of notice that his candor was at issue. The record makes clear that he had specific notice that his candor was being called into question when he responded to the ALJ's questions on October 9, 1979. Those questions were clearly directed to the inconsistencies of his previous statements. Consequently, we reject the Board's view that Mr. Rogers did not have actual notice.[109] In sum, we agree with the ALJ that Mr. Rogers' evasiveness and lack of candor were appropriate matters to be explored, and that they too serve as additional grounds upon which to justify revocation, suspension and denial here.

The Certified Question

31. Having found that the record fully supports the revocation of Mr. Rogers' Amateur station license and the denial of his application for an Amateur General Class operator's license, we now turn to the certified question; *i.e.*, whether Section 303(m) of the Act[110] authorizes suspension of his Amateur operator license for statutory and/or rule violations committed in connection with the operation of a radio station in another radio service for which an operator's license is not required. Section 303(m)(1)(A) of the Act declares that the Commission shall:

> Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee . . . has violated any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention. . . [111]

32. Notably, the statute broadly refers to violations of "any" statute or regulation. Absent a specific Congressional indication to the contrary, the Board thought that it was unlikely that suspension of an operator license was intended by Congress as a sanction for rule violations committed in the use of radio in another service. We disagree. Section 303(m)(1)(A) was derived[112] from Section 5 (D)(a) of the Radio Act of 1927,[113] which in turn can be traced to Section 3 of the Radio Act of 1912.[114] Section 5 (D)(a) of the Radio Act of 1927 authorized the Secretary of Commerce:

> To suspend the license of any operator . . . upon proof sufficient to satisfy him that the licensee . . . has violated any provision of any act or treaty binding on the United States

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[109] *See RKO General, Inc. (WNAC-TV)*, 78 FCC 2d at 104.

[110] 47 U.S.C.§ 303(m).

[111] 47 U.S.C. § 303(m)(1)(A).

[112] CONFERENCE REPORT, H.R. REP. NO. 1918, 73d Cong., Sess. 47 (1934).

[113] The Radio Act of 1927, Pub. L. No. 264, 44 Stat. 1162 (1927).

[114] The Radio Act of 1912, Pub. L. No. 264, 27 Stat. 302 (1912).

> which the Secretary of Commerce or the Commission is authorized by this act to administer or by any regulation made by the Commission or the Secretary of Commerce under any such act or treaty. . . .

In pertinent part Section 3 of the Radio Act of 1912 also stated:

> Every person so licensed who in the operation of any radio apparatus shall fail to observe and obey regulations contained in or made pursuant to this Act or subsequent Acts or treaties . . . or any one of them . . . may suffer the suspension of said license. . . .

33. The language of Section 303(m)(1)(A) and its predecessors, thus, shows that this provision was meant to have the breadth indicated. Indeed, the only time Congress amended Section 303(m) was to expand the Commission's authority, not lessen it.[115] Thus, we conclude that Section 303(m)(1)(A) of the Act means what it says—that the Commission can suspend the license of any operator upon proof sufficient to satisfy it that the holder of that license has violated any provision of the Communications Act or any regulation made pursuant to the Act.

34. Obviously, the grant of such authority is a different question from how, and under what circumstances, the authority should be exercised. That must be answered on a case by case basis, taking into account the nature and seriousness of the violations involved. But, here, where the holder of an operator's license has committed serious violations of the Commission's Rules which warranted the assessment of monetary forfeitures, has knowingly repeated those violations[116] so as to require a holding that the public interest, convenience and necessity would be served by the revocation of his Amateur station licensee, and has been less than candid in dealing with this Commission in a manner reflecting adversely on his character qualifications to be a licensee, we believe that suspension under Section 303(m)(1)(A) is appropriate.

35. ACCORDINGLY, IT IS ORDERED, That:

(a) The Application for Review filed by the Chief, Private Radio Bureau, on August 13, 1980 IS GRANTED as set forth above;

(b) The Review Board Decision, 78 FCC 2d 1424, released July 15, 1980 IS MODIFIED to the extent indicated herein;

(c) William M. Rogers' license for Station WD5FPO in the Amateur Radio Service IS REVOKED;

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[115] In 1937, Congress amended Section 303(m) of the Act to include additional reasons for suspending an operator's license, such as the transmission of deceptive signals, using a false call sign, and obtaining an operator's license by fraudulent means. The legislation also provided for an appeal from an order of suspension of an operator's license, and added Section 303(r) to empower the Commission to make such rules and regulations as may be necessary to carry out the provisions of this Act or any international treaty. H.R. REP. NO. 686, 75th Cong., 1st Sess. 5–6 (1937).

[116] Including the unauthorized operation on a FAA public safety frequency so as to endanger life.

(d) William M. Rogers' application for an Amateur General Class Operator License IS DENIED; and

(e) William M. Rogers' Amateur Technician Class Operator License IS SUSPENDED for the remainder of its term.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

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